CLERK'S COPY.

(27,572)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 290.

ANNA LANG, AS ADMINISTRATRIX, &c., OF OSCAR G. LANG, DECEASED, PETITIONER,

vs.

NEW YORK CENTRAL RAILROAD COMPANY.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 10, 1920.

a Certified Copy.

STATE OF NEW YORK:

Court of Appeals.

ANNA E. LANG, as Administratrix of the Goods, Chattels and Credits of Oscar C. Lang, Deceased, Respondent,

vs.

THE NEW YORK CENTRAL RAILROAD COMPANY, Appellant.

Record on Appeal.

Julius A. Schreiber, Attorney for Respondent, 104 Erie Co. Bank Building, Buffalo, N. Y.

Locke, Babcock, Spratt & Hollister, Attorneys for Appellant, 814 Fidelity Bldg., Buffalo, N. Y.

b STATE OF NEW YORK,
Court of Appeals,
Clerk's Office:

I, R. M. Barber, Clerk of the Court of Appeals of the State of New York, do hereby certify that the annexed printed record in the case of Anna E. Lang, as Administratrix of the goods, chattels and credits of Oscar C. Lang, deceased, Respondent, against The New York Central Railroad Company, Appellant, is a copy of the printed record therein, which was submitted on the argument of said case before the Court of Appeals on December 4, 1919, and that the same is a true and correct copy thereof.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court of Appeals, at the City of Albany, this tenth day of February A. D., 1920.

[Seal of the State of New York Court of Appeals.]

R. M. BARBER,
Clerk.

1 STATE OF NEW YORK:

Supreme Court, Erie County.

ANNA E. LANG, as Administratrix of the Goods, Chattels and Credits of Oscar C. Lang, Deceased, Plaintiff,

vs.

THE NEW YORK CENTRAL RAILROAD COMPANY, Defendant.

Statement under Rule 41.

The original parties were Anna E. Lang, as administratrix, plaintiff, and The New York Central Railroad Company, defendant. There has been no change of parties, since the commencement of this action. The firm of Locke, Babcock, Spratt & Hollister, was substituted as attorneys for the defendant, in place of Alexander S. Lyman, Esq., by an order of The Supreme Court entered April 3rd, 1918. Action was started by the service of a summons, January 11th, 1918. Issue was joined by the service of an answer February 13th, 1918. The action arose of an injury alleged to have been sustained by plaintiff's intestate while assisting in switching cars at Silver Creek, N. Y., when he was caught between two cars, sustaining injuries which resulted in his death.

The action was brought to trial before a Justice of the Supreme Court and a jury on the 10th day of June, 1918, and resulted in a verdict of $18,000, the jury apportioning the verdict giving $7,000 for the benefit of the widow, Anna Lang; $2,500 for the infant son, Raymond J. Lang; $4,000 for infant daughter, Dorothy Lang, and $4,500 for the infant son, John A. Long.

Judgment was entered June 13, 1918, for $18,070.83. The order denying motion for new trial was entered October 22, 1918. Judgment and order were affirmed by the Appellate Division March 5, 1918, by a divided court.

2 *Notice of Appeal from Judgment.*

Supreme Court, Erie County.

ANNA LANG, as Administratrix of the Goods, Chattels and Credits of Oscar C. Lang, Deceased, Plaintiff,

vs.

THE NEW YORK CENTRAL RAILROAD COMPANY, Defendant.

SIRS:

Take notice that the defendant herein hereby appeals to the Appellate Division of the Supreme Court, Fourth Department, from a judgment entered herein in Erie County Clerk's office on the 13th

day of June, 1918, on the judgment entered herein in favor of the plaintiff and against the defendant, for the sum of $18,000.00 damages and $70.83 costs; and the defendant appeals from each and every part of said judgment.

Dated July 11, 1918.

LOCKE, BABCOCK SPRATT & HOLLISTER,
Attorneys for Defendant, 814 *Fidelity Building, Buffalo, N. Y.*

To Julius A. Schreiber, Attorney for Plaintiff, and to Clerk of Erie County.

3 *Notice of Appeal from Order Denying Motion for New Trial.*

Supreme Court, Erie County.

ANNA E. LANG, as Administratrix of the Goods, Chattels and Credits of Oscar C. Lang, Deceased, Plaintiff,

against

THE NEW YORK CENTRAL RAILROAD COMPANY, Defendant.

SIRS:

Please Take Notice, that the defendant herein, hereby appeals to the Appellate Division of the Supreme Court, Fourth Department, from an order made herein, on the 22nd day of October, 1918, and entered in the office of the clerk of Erie County, on October 23rd, 1918, denying defendant's motion for new trial, on the Judge's minutes and upon all the grounds specified in Section 999 of the Code of Civil Procedure, and the defendant appeals from each and every part of said order.

Yours, etc.,

LOCKE, BABCOCK, SPRATT
& HOLLISTER,
Attorneys for Defendant, 814 *Fidelity Building, Buffalo, N. Y.*

To Julius R. Schreiber, Esq., Attorney for Plaintiff, and to Clerk of Erie County.

4 *Summons.*

STATE OF NEW YORK:

Supreme Court, Erie County.

ANNA E. LANG, as Administratrix of the Goods, Chattels and Credits of Oscar C. Lang, Deceased, Plaintiff,

vs.

THE NEW YORK CENTRAL RAILROAD COMPANY, Defendant.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this Summons, inclusive of the day of service, and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Trial to be held in the County of Erie.

Dated this 8th day of January, 1918.

JULIUS A. SCHREIBER,
Plaintiff's Attorney, Office and P. O. Address,
418 *Erie Co. Sav. Bk. Bldg. Buffalo, N. Y.*

5 *Complaint.*

Supreme Court, Erie County.

ANNA E. LANG, as Administratrix of the Goods, Chattels and Credits of Oscar C. Lang, Deceased, Plaintiff,

vs.

THE NEW YORK CENTRAL RAILROAD COMPANY, Defendant.

The plaintiff above named by Julius A. Schreiber, her attorney, complains of the defendant and alleges:

First. That the defendant now is and at all the times hereinafter mentioned was, a domestic railroad corporation with its office and principal place of business in the City of New York, and engaged in the business of owning, maintaining and operating a steam service railroad in and through the various states of New York, Pennsylvania and Ohio, and is, and at all the times hereinafter mentioned was engaged in interstate commerce.

Second. That heretofore and on the 1st day of November, 1917, one Oscar C. Lang was in the employ of the defendant as a freight conductor upon its lines of railroad in the states of New York and

Pennsylvania, and on that day while performing certain work for the defendant in the vicinity of Silver Creek, N. Y., was engaged in interstate commerce therein.

6 Third. That heretofore and on the 1st day of November, 1917, the said Oscar C. Lang was required by the defendant to assist in the movement of a train of cars, which had been brought from the City of Erie, Pennsylvania; that when the said train reached the said village of Silver Creek, it became the duty of the plaintiff and the other members of the crew to take up a car standing on the siding near the freight house and attach the same to said train, that the said Oscar C. Lang while in the discharge of his duties as such freight conductor, got on top of one of defendant's cars and in attempting to apply the brakes on said car his right foot slipped off the end of said car and while in the act of pulling himself up, the car upon which said Oscar C. Lang was riding collided with the car standing on said siding, and said Lang's right leg was caught between the two running boards of said car, injuring him so severely that he died.

Fourth. Plaintiff further alleges; that the said accident occurred wholly and solely through the negligence and carelessness of the defendant, its agents, servants and employees, and while plaintiff was in the exercise of due care.

Fifth. Plaintiff further alleges, that the car which collided with the car upon which the plaintiff Oscar C. Lang was riding was not equipped with a draw bar, and that the said car and train were then and there being moved, operated and maintained by the defendant in violation of the acts of Congress of the United States, known as the "Safety Appliance Act."

Sixth. Plaintiff further alleges, that the said car which collided with the car on which said Lang was riding was defective in that it was not equipped with a draw bar, that by reason thereof
7 the running boards on top of said two cars came together catching plaintiff's right leg, and that said defective condition caused and contributed to the accident of said Oscar C. Lang, and arose from the negligence and carelessness of this defendant, and which said condition of said car and its equipment and attachment was caused by the negligence and carelessness of the defendant, its agents, servants and employees, and that by reason of such negligence and carelessness and such insufficient and defective equipment the accident occurred.

Seventh. Plaintiff further alleges, that the defendant failed and neglected to make proper and necessary and customary inspection of said car and that an inspection thereof would have revealed its defects and that said failure on the part of the defendant to make such inspection was such negligence and carelessness which caused and contributed to the accident to the said Oscar C. Lang.

Eighth. Plaintiff further alleges that defendant failed and neglected to make and enforce and promulgate necessary and proper rules governing the inspection of the said cars prior to their being placed in the train of which the plaintiff had charge, and failed to warn and advise the plaintiff of the condition of the said car prior to the said accident, all of which were matters of negligence and carelessness on the part of the defendant, which caused and contributed to the accident to the plaintiff.

Ninth. Plaintiff further alleges that at the time of said accident said Oscar C. Lang and this defendant was engaged in interstate commerce within the purview of an act of Congress, commonly known as The Federal Employees' Liability Act, "An act re-
8 lating to the liability of common carriers of a railroad to their employees in certain cases." An act by Congress and approved by the United States on the 22nd day of April, 1908, and the act supplemental of and amendatory thereof.

Tenth. That the said Oscar C. Lang died intestate in the City of Dunkirk, N. Y., leaving him surviving plaintiff, Anna E. Lang, his widow and three children, viz: Raymond J. Lang, born December 23, 1905, Dorothy M. Lang born February 15, 1913, and John A. Lang, born January 19, 1916.

Eleventh. That on the 13th day of November, 1917, letters of administration of the personal estate of Oscar C. Lang, deceased, were duly issued by the Surrogate's Court of this County to Anna E. Lang who duly qualified and entered upon and still continues in the discharge of her duties as such. That by reason of the foregoing facts plaintiff has suffered damage in the sum of $50,000.00.

Wherefore, plaintiff demands judgment against said defendant for the sum of $50,000.00 and the cost of this action.

JULIUS A. SCHRIEBER,
Plaintiff's Attorney, Address and P. O. Address,
418 *Erie Co. Sav. Bk. Bldg, Buffalo, N. Y.*

9 *Answer.*

Supreme Court, Erie County.

ANNA E. LANG, as Administratrix of the Goods, Chattels and Credits of Oscar C. Lang, Deceased, Plaintiff,

against

THE NEW YORK CENTRAL RAILROAD COMPANY, Defendant.

The defendant answering the complaint of the plaintiff in the above entitled action:

1. Admits the allegations of the complaint contained in the paragraph or subdivision thereof numbered "First."

2. Denies that it has any knowledge or information sufficient to form a belief as to the allegations of the complaint, and each and every of them, contained in the paragraphs or subdivisions thereof numbered "Second," "Third," "Fourth," "Fifth," "Sixth," "Seventh," "Eighth," "Ninth," "Tenth" and "Eleventh," except that this defendant admits that on the 1st day of November, 1917, one Oscar C. Lang, then and for some time prior thereto in the employment of the defendant as a freight brakeman, met with an accident at Silver Creek, N. Y., and sustained injuries wherefrom he died, and except that this defendant admits that at the time the said Oscar C. Lang met with said accident and sustained said injuries, both he and the defendant were engaged in acts of interstate commerce.

10 3. Further answering the complaint, defendant alleges, upon information and belief, that the said accident to the said Oscar C. Lang on said 1st day of November, 1917, at said Silver Creek, N. Y., occurred, and the said injuries to him were sustained, by reason of his own negligence.

Second.

For a second, separate and distinct defense to the alleged cause of action in the complaint set forth, the defendant further avers and alleges that the said accident to the said Oscar C. Lang occurred, and the injuries to him were sustained while he was in the employment of the defendant as a freight brakeman; that said employment was at the time the said Oscar C. Lang entered the employment of the defendant, and continued to be, an obviously dangerous one, the risks incident to which were, and continued to be, obvious and well known; and were obvious and well known to the said Oscar C. Lang, and assumed by him, at the time he entered said employment; and obvious and well known to him, and assumed by him, during the entire time of his continuance in said employment; and that the accident and injuries complained upon arose from and were risks incident to said employment, which risks the said Oscar C. Lang took and assumed at the time he entered, and during his continuance in said employment.

Wherefore, the defendant demands that the complaint be dismissed, with costs.

ALEX. S. LYMAN,
Attorney for Defendant, Room 3510, Grand Central Terminal, Borough of Manhattan, New York City.

11 STATE OF NEW YORK,
County of New York, ss:

Edward L. Rossiter, being duly sworn, says, that he is an officer of The New York Central Railroad Company, the defendant above named, to wit, the Treas. thereof; that the foregoing answer is true

to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

EDWARD L. ROSSITER.

Sworn to before me this 13th day of February, 1918.

JOHN A. VETT,
Notary Public,
Westchester County.

Certificate filed in New York and Bronx Counties.
N. Y. County No. 63, N. Y. Register No. 9051.
Bronx County No. 5, Bronx Register No. 905.
My commission expires March 30, 1919.

12 *Order Substituting Attorneys.*

At a Special Term of the Supreme Court Held in and for the County of Erie, at Court House in the City of Buffalo, N. Y., on the 3rd Day of April, 1918.

Present:
Hon. Edward K. Emery, Justice.

Supreme Court, Erie County.

ANNA E. LANG, as Administratrix of the Goods, Chattels and Credits of Oscar C. Lang, Deceased, Plaintiff,

against

THE NEW YORK CENTRAL RAILROAD COMPANY, Defendant.

On reading and filing the consent below written and on motion of Locke, Babcock, Spratt & Hollister, it is

Ordered, that Locke, Babcock, Spratt & Hollister be, and they hereby are substituted as attorneys for the defendant, The New York Central Railroad Company, in the above entitled action in place and stead of Alex S. Lyman.

EDWARD K. EMERY,
J. S. C.

It is hereby consented that Locke, Babcock, Spratt & Hollister be substituted as attorneys for the defendant, The New York
13 Central Railroad Company, in the above entitled action, in place and stead of Alex S. Lyman.

Dated, New York, March 30, 1918.

ALEX. S. LYMAN,
Defendant's Attorney.
THE NEW YORK CENTRAL
RAILROAD COMPANY,
By E. L. ROSSITER,
Treasurer.

STATE OF NEW YORK,
County of New York, ss:

On this 30th day of Mar., 1918, before me personally appeared Edward L. Rossiter, to me personally known and known to me to be the Treasurer of The New York Central Railroad Company, the corporation described in and which executed the foregoing consent, who, being by me duly sworn, did depose and say that he resides in the town of Greenwich, Fairfield County, Conn.; that he is the Treasurer of The New York Central Railroad Company; that he executed the foregoing consent in behalf of and as the act and deed of said The New York Central Railroad Company, and that he so executed the same by authority of the Board of Directors of said Company.

JOHN G. VETT,
Notary Public,
Westchester County.

Certificate filed in New York and Bronx Counties.
N. Y. County No. 63, N. Y. Register No. 9051.
Bronx County No. 5, Bronx Register No. 905.
My commission expires March 30, 1919.

14 *Judgment.*

Supreme Court, Erie County.

ANNA E. LANG, as Administratrix of the Goods, Chattels and Credits of Oscar C. Lang, Deceased, Plaintiff,

against

THE NEW YORK CENTRAL RAILROAD COMPANY, Defendant.

The above entitled action having come on for trial in Part IV of this Court before the Hon. Charles B. Wheeler, Justice, and a jury on the 10th day of June, 1918, and the said jury thereafter and on the 11th day of June, 1918, rendered a verdict in favor of the plaintiff and against the defendant for the sum of $18,000.00, apportioning said verdict and directing that $7,000.00 be for the benefit of the widow, Anna Lang; $2,500.00 thereof for the benefit of the infant son, Raymond J. Lang; $4,000.00 for the benefit of the infant daughter, Dorothy M. Lang; $4,500.00 thereof for the benefit of the infant son, John A. Lang; and said verdict having been duly reported to the Court and entered in the Minutes of the Clerk thereof, it is hereby

Adjudged, that the plaintiff recover of the defendant the sum of $18,000.00 so found by said jury, together with the sum of $70.83, costs, amounting in all to the sum of $18,070.83, and that $7,000.00 of said verdict be set aside for the benefit of Anna

Lang, widow; $2,500.00 for the benefit of the infant son
15 of plaintiff, Raymond J. Lang; $4,000.00 for the benefit of the infant daughter of plaintiff, Dorothy M. Lang and $4,500.00 for the benefit of infant son of plaintiff, John A. Lang, and that plaintiff herein have execution against said defendant therefor.

Judgment signed this 13th day of June, 1918.

EDWARD J. CLARK,
Deputy Clerk.

16 *Order Denying Motion for New Trial.*

At a Trial Term of the Supreme Court Held in and for the County of Erie, at the City and County Hall in the City of Buffalo, New York, on the 22nd Day of October, 1918.

Present:

Charles B. Wheeler, Justice Presiding.

Supreme Court, Erie County.

ANNA E. LANG, as Administratrix of the Goods, Chattels and Credits of Oscar C. Lang, Deceased, Plaintiff,

against

THE NEW YORK CENTRAL RAILROAD COMPANY, Defendant.

The above entitled action, having come on for trial in Part IV of this Court before the Hon. Charles B. Wheeler, Justice, and a jury on the 10th day of June, 1918, and a verdict having been rendered by the jury on the 11th day of June, 1918, in favor of the plaintiff for the sum of Eighteen Thousand ($18,000.00) Dollars, and a motion having been made by the defendant for a new trial on the judge's minutes and upon all the grounds specified in Section 999 of the Code of Civil Procedure, Maurice C. Spratt, of counsel for defendant, appearing for said motion, and Julius A. Schreiber, of counsel for plaintiff, appearing in opposition thereto, it is hereby

17 Ordered, that the defendant's motion for a new trial be and the same is hereby denied with costs.

CHAS. B. WHEELER,
Justice Supreme Court.

Granted, Oct. 22, 1918.
FRANK G. SHAPER,
Sp. Dep. Clerk.

18 *Clerk's Minutes.*

At a Trial Term of the Supreme Court Held at the City and County Hall, in the City of Buffalo, in and for the County of Erie, on the 10th Day of June, 1918.

Present:

Hon. Charles B. Wheeler, Justice Presiding.

Court convenes at 9:45 A. M.
Recess till 2 P. M.
Court resumes at 2 P. M.

ANNA E. LANG, as Administratrix, etc.,

against

NEW YORK CENTRAL RAILROAD COMPANY.

J. A. Schreiber, Hamilton Ward.
Locke, Babcock, Spratt & Hollister (per M. C. Spratt).

Jury.

1. Louis L. Berger.
2. William R. Bliven.
3. Edward R. Roderick.
4. Frederick P. Brice.
5. Herman A. Hammond.
6. Jacob W. Rosendale.
7. John J. Leary.
8. Herbert A. Howard.
9. John Schaefer.
10. Frank W. Lathrop.
11. Charles E. Alvord.
12. Allen E. Klopp.

19 Plaintiff's Counsel opens case.
Defendant's Counsel waives opening.

Witnesses for Plaintiff:

Edward R. Dauterman.
George Ernst.
George E. Valance.
George Ernst (continued).

Court adjourns to June 11th, 9:45 A. M.
June 11, 1918, Wheeler, J.
Court convenes at 9:45 A. M.

Witnesses for Plaintiff:

George Ernst (recalled).
Anna E. Lang (plaintiff).

Plaintiff rests.
Defendant's Counsel moves fora non-suit.
Denied.

Witnesses for Defense:

Martin Culligan.
Timothy Hassett.

Defendant rests. Evidence closed.

Defendant's Counsel moves for a direction of a verdict for Defendant.
Denied.
Counsel sums up.
Court charges the Jury.
Jury retires to deliberate, in the custody of Deputy Sheriffs Fink and Baetzner, who are sworn as officers in charge of this Jury.

Recess till 2 P. M.

Court resumes at 2 P. M.
Jury returns into Court and says it finds a verdict for the Plaintiff for the sum of Eighteen Thousand Dollars ($18,000.00) and apportions said damages as follows:
To Anna E. Lang, widow, $7,000.00.
To Raymond J. Lang, son, $2,500.00.
20 To Dorothy M. Lang, daughter, $4,000.00.
To John A. Lang, son, $4,500.00.

June 20, 1918, Wheeler, J.
Defendant's Counsel moves for a new trial on all grounds under Section 999, Code of Civil Procedure. Argument to be heard at later date.

I hereby certify that the foregoing is a true copy of the Clerk's minutes in the above entitled action.

FRANK G. SHAFER,
Special Deputy County Clerk, Erie County, N. Y.

21 *Testimony.*

Supreme Court, Erie County.

ANNA E. LANG, as Administratrix,

vs.

NEW YORK CENTRAL RAILROAD COMPANY.

J. A. Schreiber, Hamilton Ward; of Counsel.
Locke, Babcock, Spratt & Hollister (per M. C. Spratt).

The trial of this Cause was commenced Monday, June 6, 1918, before the Honorable Charles B. Wheeler, Justice, presiding, and a Jury, in Part IV, Room 34, City and County Hall in the City of Buffalo and State of New York.

The empanelling of the jury was begun.

Mr. Ward: I request the Court to require Mr. Spratt to say whether he accepts the jury before I exhaust my list of peremptories.

Mr. Spratt: I decline to do so.

Mr. Ward: If I excuse Mr. Tuttle he will excuse some and then some more will be drawn and as to those I will have no peremptory challenge. It is his duty to exercise his peremptories first.

Mr. Spratt: No. I have a right to wait until the end to determine whether I will accept or not.

The Court: I will overrule your request and give you an exception.

The empanelling of the jury was completed after which Mr. Ward for the Plaintiff opened the case, Mr. Spratt for the Defendant waiving the opening.

22 EDWARD R. DAUTERMAN, was called as a witness in behalf of the Plaintiff and having been duly sworn testified on direct examination by Mr. Ward as follows:

Q. Are you a locomotive engineer?
A. Yes, sir.
Q. You work for the New York Central?
A. Yes, sir.
Q. Do you hear me all right?
A. Yes, sir.
Q. You were the engineer of the train of which Mr. Lang was a member of your crew?
A. Yes, sir.
Q. Where did your train start from?
A. Erie.
Q. And where was it headed for?
A. Buffalo.
Q. What did your train crew consist of, how many men?
A. Conductor and three brakemen.
Q. Mr. Lang was one of the brakemen?

A. Yes, sir.
Q. Had you any acquaintance with him before this?
A. Have I any?
Q. Did you have any acquaintance with Mr. Lang before this?
A. No, sir.
Q. The conductor was Mr. Ernst?
A. Yes, sir.
Q. When you get orders to do work at these stations do they give a copy of the orders to the engineer?
A. No, sir.
Q. You did not see the orders?
A. No, sir.
Q. What kind of a train was this?
A. A way-freight, what they call a local.
Q. What did you do when you got to Silver Creek?
A. We went in on the east end.
Q. Well, now, let us see; let me get the general lay of the land there straightened out a little bit. You were running on what is called the Lake Shore, were you not?
A. Yes, sir.
Q. That is a double track or a four track?
A. Four track.
Q. Four track road?
A. Yes, sir.
Q. Two tracks for freight, two for passengers?
A. Well, they use it for either.
23 Q. What track did you come in on?
A. On No. 1.
Q. Is that the nearest the Lake or nearest the mainland?
A. Nearest to the main line.
Q. Nearest to the village?
A. Right next to the depot, first track from the depot.
Q. And you were going to take a car off the siding there, were you?
A. Well, now, I can't answer that.
Q. What signals did you get after you got there?
A. We went in on the east end of the house.

Mr. Spratt: House track.

Q. What do you mean by that? You see, your railroad——
A. On the side track, the freight house track where the cars were on.
Q. That is, you took your whole train in?
A. No, sir.
Q. Just the engine?
A. Just the engine.
Q. East end; now, that is the end toward Buffalo, is it not?
A. Yes, sir.
Q. Who gave you the signals for that movement?
A. My brakeman.
Q. Who was that?
A. Mr. Chessel.

Q. What did you do when you went in on the east end of the house track?

Mr. Ward: Am I correct in calling it the house track, Mr. Spratt?
Mr. Spratt: Yes.
The Witness: Yes, that would be right.

Q. What did you do when you went in there?
A. Well, now, I can't just remember but I think that we took a car out of there.
Q. How many cars?
A. I should say about one; I am not going to say positively whether one or two.
Q. What time of day or night was this?
24 A. Well, it is so long ago I haven't kept that——
Q. Was it day time or night time?
A. Yes, sir, day time.
Q. What did you do with this one car that you pulled out?
A. We hung on to it.
Q. Where did you take it?
A. Away down to the side track.
Q. Sir?
A. Up the side track.
Q. Then what is the next thing you did?
A. Got hold of some cars on the grape track.
Q. On the what track?
A. On the grape track, that is the track next to the house.
Q. That is another switch track?
A. Yes, sir.
Q. Did you still have this car with you, this one you had taken hold of first or did you drop that?
A. No, we didn't make no drop of it at all.
Q. Still with you?
A. Still with us.
Q. Were they connected on the front end or back end?
A. On the back end of the engine.
Q. Did you then have to connect these other cars that you took off the grape track?
A. Not on the back of the engine, no.
Q. Put them on the front?
A. In the front.
Q. What did you do with them?
A. Made a shift on the freight——
Q. Tell us what you mean.
A. Made a shift on the house track.
Q. Tell us what you mean by that.
A. Well, the first track, what we call the house, that is the freight house track, and the track next to that is what we call the grape track; them are the two sidings where they unload cars; grape track is where they unload cars and freight house track is where they unload freight for the freight house.
Q. Then what did you do?

A. We made one shift on the house, on the house track.
Q. Can't you tell us that in common talk, not railroad talk?
A. Well, what more? Isn't that plain?
25 Q. Not to me, Mr. Dauterman.
A. Well, I should think it would be very plain.
Q. Well, what did you do with these cars?
A. Well, I will——
Q. Wait a minute; your lawyer is going to explain.

(Mr. Spratt explains to Mr. Ward.)

Q. You finally had to take some cars off the house track, did you not?
A. We went in on the team track. Now I will talk team track to you; will that be plainer to you?
Q. Probably. Go ahead.
A. Then we got three or four cars off the team track and we put them on the house.
Q. Yes.
A. And that is when Mr. Lang got hurt.
Q. How far away were you from him when he got hurt?
A. Well, they kicked the cars in there and I run down the siding and when I got there he says to me, "Ed.," he says——
Q. You cannot tell what he said.
A. All right then, I won't tell that.
Q. Did you kick these cars in on the siding?
A. Yes, sir.
Q. How did you do that?
A. Why, just give them a little start, that is all.
Q. And then they go by themselves?
A. Yes, sir.
Q. After you give them a little start you cut them loose from the engine?
A. Yes, sir.
Q. How far were you trying to kick them?
A. Oh, don't—not much of a kick there.
Q. How far were you trying to kick them?
A. About ten feet.
Q. Ten feet?
A. That is all, about that, I kicked them about ten feet.
Q. What were you going to kick them up against?
A. Up against the other cars.
26 Q. Is that the way they do in railroading, keep the cars close together?
A. Yes, sir.
Q. Up in contact with each other?
A. Yes, sir.
Q. And your intention was then to give these cars a sufficient kick so that they would go up against the other cars?
A. Yes, sir.

Mr. Spratt: I object to that as leading, suggestive and calling for a conclusion.

The Court: Well, it is in.
Mr. Spratt: I ask it be stricken out.
The Court: I will deny the motion and give you the exception.

Q. About how far did these cars have to go, did you see, when you let go of them?
A. Why, didn't have to go over a car length, I believe.
Q. About a car length?
A. About a car length.
Q. How many cars were there in that string that you kicked in on the house track?
A. Three cars.
Q. Well, in the railroad business when you kick cars in on a track like that, do you have a man riding on them?
A. If it is in a place that needs it, they do; if a place that don't, they don't.
Q. Do you know whether there was any man riding on these cars that you kicked in?
A. He wasn't that time.
Q. Did you see whether there was any man riding on them?
A. I said he wasn't at the time.
Q. Wasn't riding on them?
A. No, sir.
Q. Where was he when you saw him?
A. Standing on the car.
Q. Which car?
A. At the brake, on the head car, the east car.
Q. That is, he was standing on the car?
A. East car.
Q. That you kicked in?
A. Yes, after I saw him, yes.
Q. That was when you saw him?
A. Yes.
27 Q. Was that before you kicked them in or afterwards?
A. After I kicked them in.
Q. What kind of cars were they?
A. They were refrigerator cars.
Q. Box cars?
A. Merchandise despatch cars, yes, sir.
Q. Afterwards did you go in there and look at the car that he went up against?
A. No, sir.
Q. Did you see that car at any time?
A. No, sir.
Q. Did you see him after the accident?
A. Yes, sir.
Q. Did you help take him down?
A. No, sir.
Q. You stayed on your engine?
A. I got off the engine.
Q. Where did you go?
A. Looked for a plank to get him down.

Q. Did you help take him down?
A. Yes, sir.
Q. And didn't you see that car then that he went up against?
A. After it happened?
Q. Yes.
A. Yes, after it happened I did.
Q. What was the condition of that car that he went up against?
A. Drawbar was out of it.
Q. What is the drawbar?
A. Why, it is where they couple together.
Q. And does that include the coupling and the knuckle and the whole business?
A. Yes, sir.
Q. The whole thing was gone?
A. Yes, sir.
Q. Was it laying there?
A. No, sir.
Q. Wasn't there at all?
A. Didn't see it there.
Q. What kind of a car was this that the drawhead was gone from?
A. Box car.
Q. You remember what kind of a box car?
A. No, sir.
Q. You know whether it was loaded or empty?
A. I couldn't say.
Q. How many other cars were there on that siding there?
A. I couldn't say.
Q. Well, about?
A. I couldn't say.
28 Q. Several?
A. Yes, there were several.
Q. Were there other cars back of this defective car?
A. I couldn't tell you.
Q. Did the car that you took out of there come from a point next to the defective car?
A. It must have.
Q. So that you pulled the car out of there——
A. I didn't pull any car out of there.
Q. Didn't you pull a car out of there?
A. Not to my knowledge, no, sir.
Q. Well, where did you get these cars from that you were putting back in there?
A. On the team track.
Q. Is that the next track?
A. Yes, sir.
Q. So that you took cars off the team track to put on this track?
A. Yes, sir.
Q. Who told you to do that?
A. The brakeman.
Q. What brakeman was that?
A. Mr. Chessel.

Q. He is here, is he?
A. Yes, sir.
Q. How close up against the defective car could the other car come with that drawhead out, Mr. Dauterman?
A. How close would it come?
Q. Yes.
A. Well, now, I couldn't answer that question. I couldn't answer that question.
Q. Would it come up against the end of it?
A. I can't answer that question.
Q. What part of the cars would strike when that drawhead was out?
A. What part of the car did it strike?
Q. What part of the cars would strike together with the drawhead gone out of one of them?
A. Strike the east end—or the west end.
Q. What part of the cars would it strike first?
A. I can't answer that question.
Q. Would the drawhead of the car that you kicked in there go into the hole where the other drawhead came out?
A. It might; it might not.
Q. Do you know whether it did or not on this occasion?
A. I couldn't say.
29 Q. How close were the cars together when you got down there to help Mr. Lang down?
A. They weren't together at all; they were apart.
Q. How much apart?
A. I should judge about two feet.
Q. Those cars, in the condition they were in at that time, could not couple automatically on impact, could they?

Mr. Spratt. Objected to as a leading question.
The Court: He may answer.

A. Not with the drawbar out.
Q. What did you do with Mr. Lang?
A. We took him off the box car, put him in the caboose and took him to Dunkirk.
Q. Was he conscious?
A. Yes, sir.
Q. Appear to be suffering?
A. No, sir.
Q. Where was he hurt?
A. Well, all I know they tied up his leg here; that is all I know; we couldn't see it.
Q. Bleeding?
A. Yes, sir.
Q. Leg smashed?
A. I couldn't tell you.
Q. Did you take his clothes off?
A. No, sir.
Q. Didn't do anything for him?

A. No; just took and tied it up with a bell cord.
Q. And took him to the Dunkirk——
A. Hospital.
Q. Left your train there?
A. Yes, sir.
Q. That is a short distance from Dunkirk?
A. Yes, sir, about ten miles.

Cross-examination.

By Mr. Spratt:

Q. This accident, you say, happened on the team track?
A. No.
Q. What track?
A. On the house track.
Q. The house track, that was the track next to the freight house?
A. Yes, sir.
Q. Was that the track where they unloaded cars there?
A. Yes, sir.
Q. At Silver Creek. Your business is to run the engine?
A. Yes, sir.
Q. You take the signals from the conductor and the brakeman?
A. Yes, sir.
Q. As to where you go. And so whatever movements were made by your engine in switching there were made in answer to signals given by the conductor and brakeman?
A. Yes, sir.
Q. Of which Mr. Lang was one?
A. Yes, sir.
Q. Now, to get right down to the time that you put the cars in on the house track, you say that you shunted the cars in there?
A. Yes, sir.
Q. Some three or four cars you thought?
A. There were about three cars. I should judge about three cars.
Q. And you shunted them in in answer to a signal from some of the train crew?
A. Yes, sir.
Q. Who gave you the signal to put it in?
A. Mr. Chessel.
Q. What kind of a movement did you make to shunt it in?
A. Why, didn't give them much of a start at all.
Q. Was it an easy——
A. It is a little down hill in there and they will run.
Q. Was it an easy start you gave it?
A. Yes, sir, easy.
Q. Whose duty is it to stop the cars when they are put in in that way?
A. The brakeman.
Q. And how do they stop?
A. Why they generally get on top and set a brake.

Q. When you started to shunt the cars in there you don't know who was on the cars at that time?
A. I didn't see anybody on the cars at that time.
Q. You didn't see Mr. Lang until after the accident happened?
A. That is it.
Q. Then he was up there on top of the car?
A. He was on top of the car.
Q. This was in day time, was it?
A. Yes, sir.
Q. Was it clear daylight?
A. Yes, sir.
31 Q. Was there any trouble in anyone's seeing this car that was standing on the track there that had the drawhead out?
A. Was there any trouble of anybody seeing it?
Q. Yes.
A. Not that I know of.
Q. Could it be seen easily?
A. It could certainly have been seen easily.
Q. And when you got down there these cars were about two feet apart?
A. Yes, sir.

Mr. Spratt: That is all.

GEORGE ERNST, was called as a witness in behalf of the plaintiff and having been duly sworn testified on direct-examination by Mr. Ward as follows:

Q. What is your business?
A. Conductor.
Q. Were you the conductor of Mr. Lang's crew?
A. Yes, sir.
Q. This accident happened what date?
A. Why, I just forget the date now.

Mr. Spratt: November 1, 1917.
The Witness: November 1st.

Q. Had Mr. Lang run with you before?
A. Why, he was on with me, my regular brakeman.
Q. How long had he run with you?
A. I could tell by looking at my book now.
Q. Well, just roughly?
A. He was on there a couple of months; month and a half.
Q. And seemed to be an experienced, competent man?
A. Yes, sir.
Q. Was his work all right?
A. Yes, sir.
Q. Was he a man in good health?
A. Yes, sir.
Q. And as long as you ran with him you had no occasion to find fault with him?

A. No, sir.

32 Q. Are you familiar with that track outlay there at Silver Creek?

A. Yes, sir.

Q. Could you make a little sketch there on that blackboard and show us how those tracks are?

A. Yes, sir.

Mr. Ward: May I have the Court's permission for Mr. Ernst to do so?

The Court: Yes.

A. (Draws sketch on board.) Here is track No. 1; this is the side track and this is the house track and this is the grape track (indicating), that is where they load grapes in grape season. Sometimes they call it the team track.

Q. Just mark the names on them.

A. (Marking.) This is No. 1.

Q. That is the main track, is it?

A. Main track. Now, there is a switch here on the house connects with this (drawing sketch), that is the house track switch at the east end.

Q. East end towards Buffalo?

A. Towards Buffalo.

Q. Well then we have got the top of the map to the south, have we?

A. Got the top of the map to the south.

Q. I will mark it south. And this is north down here and this is east and that is west (marking on sketch).

A. This switch here runs from No. 1 to the house track; that is the east end; this is the main track to Buffalo and there is a switch in here—or this is the siding—just a minute; this is the siding, that track; it happened over here, and this is the house track (indicating).

Q. All right. Show us where the house track is.

A. Just a minute; I think I have got that too far; the side track runs the other way; this is No. 1; the side track comes in about here; the house track or the side track; this is the side track; the house stands here, house track; this is the switch; No. 1, that is

33 house track and then here is a siding runs in here like that (indicating); this house track comes down in through here. There is a switch right here goes into the house; this is a switch here goes into the siding right here (indicating).

Mr. Ward: Perhaps the station agent there could make that thing.

Your Honor I have the station agent under subpœna. If Mr. Ernst would step aside the station agent could draw it; perhaps he is more familiar with it.

The Court: Have you a sketch of it?

Mr. Spratt: Yes, I have a sketch.

Mr. Ward: That is too small.

The Court: All right; call the other witness.

GEORGE E. VALANCE, was called as a witness in behalf of the plaintiff and having been duly sworn testified on direct-examination by Mr. Ward as follows:

Q. You are the station agent for the New York Central at Silver Creek?
A. Yes, sir.
Q. And you were in November, 1917?
A. Yes, sir.
Q. You are familiar with the track outlay and so on there?
A. Why, somewhat, yes, sir.
Q. Will you be kind enough to put that track outlay there on the board, putting the north toward the top; I think we will all be more familiar with it that way.
A. The north?
Q. To the top of the board, yes. If that means twisting you up, why, don't try it, but that helps us always in a map to have the north at the top.
A. This you want north and this you want south and this east and this west (drawing on board). You want where these
34 tracks join, as near as I can remember?
Q. Yes, where the switches are so that we can see how the movements were made, where the connections are between the various tracks, where they come together.
A. (Draws on board.) That is as near as I can remember.
Q. Now you have placed on the board a diagram showing the station or freight house?
A. That is the freight house (indicating).
Q. And north of the freight house three parallel tracks?
A. Yes. More than that. Do you want them all?
Q. No; only those involved. The first track nearest to the freight house is what?
A. This one (indicating)?
Q. Yes, sir.
A. That is what they call a house track.

Mr. Spratt: Mark it at the end; I would suggest over at the end there.
The Witness: (Marks as requested.)

Q. The second track is what?
A. This one (indicating).
Q. Yes, sir.
A. That is the siding.
Q. And the third track is what?
A. This one (indicating)?
Q. No; the upper.
A. The main.
Q. No. 1?
A. Yes, sir.
Q. The track to the south of the station is the grape track?
A. This is the grape track here (indicating).

Q. How do you get from the main track to the siding, where is the connection?

A. The main track to the siding, this siding (indicating)?

Q. Yes, sir.

A. At which end?

Q. Either end?

A. Get in here (indicating), there is a crossover there.

Q. From the main track to the siding how do you get in?

35 A. From the main track down here (indicating)?

Q. Show us where they run together?

A. (Witness indicates.)

Q. Does the siding connect with the main track at the west end too?

A. No; goes on through; that is a long siding.

Q. So that the siding connects with the main——

A. (Witness draws on sketch.)

Q. Just a minute. So that the siding connects with the main track at the east end?

A. Yes, sir.

Q. And the house track connects with the siding at both ends?

A. Yes, sir.

Q. And here is also an intermediate crossover between the house track and the siding near the freight station?

A. Yes, sir.

Q. The grape track is south of the freight house?

A. Yes, sir.

Q. And connects with the house track at a point some distance west of the freight house?

A. Yes, sir.

Q. All right. Now you can go back on the witness stand. Silver Creek is a way station on the main line of the Lake Shore, is it?

A. The old Lake Shore, yes, sir.

Q. And you are the station agent there?

A. Yes, sir.

Q. You receive and send out freight cars daily?

A. Yes, sir.

Q. This train that was involved in this accident was a way freight that came through at the same time every day?

A. Why, practically, yes, sir.

Q. And let off and took on cars at your place?

A. Yes, sir.

Q. This way freight came from Erie and went to Buffalo; am I correct in that?

A. Yes, I think it was the eastbound local, yes, sir.

Q. On the day of the accident did you have a car on one of your tracks with a defective—wi[illegible]he drawbar out?

36 A. That is what my records show, yes, sir.

Q. And what kind of a car was it?

A. Box car.

Q. How long had it been there?

A. Records show the car arrived there—You are speaking of the box car?
Q. Yes, the defective car.
A. My records show it arrived there October 16, 1917.
Q. Where did it come from?
A. From Beaver Falls, Pa.
Q. What was it loaded with?
A. Steel.
Q. Consigned to where?
A. Silver Creek.
Q. Had it been unloaded at the time of the accident?
A. It had not; still under load.
Q. And was it in the defective condition in which it was at the time of the accident at the time it arrived?
A. Not according to the records.
Q. When was the drawhead pulled out?
A. I couldn't tell you. No record of it.
Q. How long had it been out before the accident?
A. That I couldn't answer.
Q. Did you know it was out at the time of the accident?
A. No, sir.
Q. What track was that car on?
A. The house track.
Q. East or west of the freight station?
A. Well, I should say in the vicinity of the freight house.
Q. About in front of it?
A. Well, somewhere near there, yes.
Q. Were there other cars on that track before this wayfreight came along?
A. Yes, sir.
Q. Cars on both sides of the defective car?
A. Yes, sir.
Q. Was there a car there that you wanted that wayfreight to take out?
A. Why, that I couldn't tell you.
Q. Did you give any orders for the particular movement that occured there?
A. Not personally, no, sir.
37 Q. Did you know what was to be done there?
A. Yes, sir.
Q. Are you in charge of that movement?
A. Not that part of it. My clerks attend to that.
Q. Sir?
A. I have clerks to attend to that.
Q. I mean, under you, of course?
A. Of course, I presume the local had what we call a switching list, orders on a list.
Q. Have you got that switching list with you?
A. No, sir; they are destroyed after the work is done.
Q. Can you tell us whether there was a car in that string of cars

in which this defendant car was that was to be taken out by the way-freight?

A. I couldn't tell you that.

Q. Were you there at the time of the accident?

A. No, sir.

Q. Who was in charge there as far as your station was concerned at that time?

A. Why, that immediate locality, the chief clerk.

Q. Is he here in court?

A. No, sir.

Q. Did you examine the defective car afterwards?

A. I did not, no, sir.

Q. Did you ever look at it?

A. No, sir.

Q. You know which end the drawbar and coupler was out?

A. The records show the west end.

Q. West end?

A. Yes, sir.

Q. That siding is used for the purpose of storing freight cars that are to be loaded and unloaded at the freight house?

A. Not storing them; they are set in there for that purpose.

Q. Set in there?

A. For the purpose of loading and unloading.

Q. Move out as exigencies require?

A. As occasion requires, yes, sir.

Q. Do you know whether this car loaded with steel from Pennsylvania had been standing right there in that place all the time or whether it had been shifted from time to time?

38 A. No; I think it had been shofted.

Q. Do you know how long it had been standing in that position?

A. No, I couldn't tell you how many days it had been there.

Q. In bringing cars in and taking them out I suppose it is necessary to shift those cars that were there on the siding back and forth?

A. Yes, sir; handle them every day.

Q. Part of the necessary movements to get them every day and get other freight in?

A. Yes, sir; accommodate the patron.

Q. That is done by the crews of the freight trains that come along?

A. Yes, sir.

Q. You do not keep crews there for that purpose?

A. No, sir.

Q. Who makes up the switching list of the cars that are to go out from your station when this wayfreight comes along?

A. Well, usually the second clerk, the man that keeps the car records.

Q. And is it a matter of daily occurrence that cars go out of there?

A. Yes, sir.

Q. And also that cars come in there?
A. Yes, sir.
Q. It is somewhat of a manufacturing point, Silver Creek, is it not?
A. Yes, sir, largely so.
Q. What records have you got here?
A. I have the yard book that shows the position of the cars on the various tracks outside of the long passing sidings every morning at seven o'clock, this book here (indicating), and then this is the permanent record of the cars that arrive and depart from the station.
Q. Now take your yard book and tell us from that what cars were adjoining this defective car.
A. On this date?
Q. Yes, sir.
A. Do you want it on this board?
Q. Yes, sir.
A. Now, this is seven o'clock in the morning.
39 Q. Yes, sir.

Mr. Spratt: What time did this accident happen?
Mr. Ward: He wasn't there.

Q. You are putting now car numbers on?
A. Yes, sir. This is the car with the defective drawhead (indicating).
Q. That was 2936. And east of that?
A. A. & W. P. was the initial of it.
Q. East of that was what?
A. 43868 C. B. & Q.
Q. What was in 43868 C. B. & Q., what was in that?
A. That was a car loading with machinery for the West.
Q. Car loading?
A. Yes, sir.
Q. What was the other side of the defective car?
A. L. E. & W. 12085.
Q. What was that loaded with?
A. That was what we call a peddler house car with various freight in it for Silver Creek and possibly other points, what we call a peddler.
Q. Then there were in all on that track ten cars?
A. Ten cars at seven o'clock that morning.
Q. This defective car was east of the crossover between the house track and the siding, was it?
A. Yes, sir.
Q. In your practice there do they keep those cars close up together?
A. Why, that depends entirely upon the—as I told you—the accommodation of the customer; if it requires them to be close together, they are placed close together; if they are required to be remote from each other we place them that way.
Q. How many cars can be accommodated on that track?

A. Why, probably maybe get 12 cars in there.
Q. You had 10 cars that morning?
A. 10 cars at seven o'clock, yes, sir. Possibly moved this other car——

40 Q. Do your records show which car was to be taken out by this wayfreight?
A. No, sir. The switching list would show that.
Q. You haven't that, have you?
A. No, sir, that has been performed and destroyed.

Mr. Spratt: What have you written on the board there?

Q. You have also put the number and name of a fourth car?
A. That is the second car west of the defective car at seven o'clock in the morning.

Mr. Ward: I do not think I will trouble you——

Mr. Spratt: What was the number?
A. New York Central 152485.

Mr. Ward: I do not know of any purpose in putting on any more. I think that is all.

Cross-examination.

By Mr. Spratt:

Q. So as the cars stood there in the morning on the track to the west of this defective car was L. E. & W. No. 12085?
A. 12085, yes, sir.
Q. And next west of that was New York Central car No. 152485?
A. Yes, sir.
Q. That was the order in which they stood west?
A. Yes, sir.
Q. You say that this car A. & W. P., the defective car, 2936—is that it?
A. Yes, sir.
Q. —was loaded with——
A. Steel.
Q. —iron ore?
A. Steel.
Q. Steel for someone in Silver Creek?
A. Yes, sir.
Q. What was the concern?
A. Huntley Manufacturing Company.
Q. And it was being held there to be unloaded by them?
A. Yes, sir.

41 Q. The track where this defective car was on at the time of the accident, was that where the people came to unload?
A. No. Why, you can unload; we unload from this portion of it west of the house here and about one or two cars east of the house, but if we have a car on there requires team track unloading, why, we send it over here on this track (indicating).

Mr. Ward: On the grape track?

The Witness: This is all ground along in here for teams, you know (indicating).

Q. But teams could unload on both tracks?

A. Yes, a small amount of team work on the house track.

Redirect examination.

By Mr. Ward:

Q. Where was this defective car to be unloaded when it was unloaded?

A. Beg pardon?

Q. Where did you unload this defective car when you unloaded it?

A. Why, I think the finish of it was done at the house.

Q. It was not being unloaded on this day?

A. By the team?

Q. By any means?

A. Why, I think it was; I think it was set at the house to finish the unloading of it.

Q. On the day of the accident?

A. Yes, sir.

Q. You don't know whether anything had been unloaded from it before?

A. I think there had.

Q. Partly unloaded, you think?

A. Yes, sir.

Recross-examination.

By Mr. Spratt:

Q. I just show you a sketch. Does that represent substantially the situation as it was so far as it is represented on that?

A. Yes, sir, that is the layout as far as this goes, on the east end. The west end is not indicated.

42 Q. The grape track is not?

A. The grape track runs off here (indicating).

Q. Will you just mark with a lead pencil where the grape track is?

A. (Witness marks as requested.)

Mr. Spratt: Witness marks in red lead pencil a line.

Q. Does the house track connect up with Track No. 1 west?

A. No. With the siding. To get onto No. 1 you have got to go down that way (indicating); it is a long siding there.

Mr. Spratt: I ask that be marked for identification.

The sketch referred to was marked Defendant's Exhibit A for identification.

Mr. Spratt: That is all.

GEORGE ERNST, was recalled as a witness in behalf of the plaintiff and direct examination resumed by Mr. Ward as follows:

Q. Mr. Ernst, now will you look at that sketch the last witness has placed on the board? Do you recognize that, get the bearings of that?
A. Yes; yes, sir.
Q. You came from the west with your train, did you not?
A. From the west.
Q. You came in on No. 1 track?
A. No. 1.
Q. What orders did you have for business at Silver Creek?
A. Same orders we get every day, switching.
Q. Did you have a list handed to you?
A. Yes, sir.
Q. When you get there?
A. Yes, sir.
Q. You do not know what you are going to do until you
43 get there?
A. No, sir. Know what I am going to do with my train, what is in my train.
Q. If you have any cars to put off?
A. Yes, sir.
Q. You know that?
A. Yes, sir.
Q. But what cars you are to take on, you don't know until you get there?
A. No, sir.
Q. Did you have any cars to pick up there at Silver Creek?
A. Yes, sir.
Q. How many?
A. One car.
Q. What is the first move you made after you came in with your train on the main track?
A. Well, I went in the office and got our switching list, what we call a switching list. That tells us what to do, and we went out and cut off the engine and one car and came in on the east end of the house track.
Q. Go a little slow. That is, you stopped your train where?
A. To clear the switch right there.
Q. Was that the hind end?
A. No, the head end clear of the switch; the hind end was back.
Q. Train was back along here somewhere (indicating)?
A. Yes.
Q. The head end of it near to the switch?
A. Yes, sir.
Q. Then you cut off the engine and one car next to the engine?
A. Yes, sir.
Q. Then went on beyond the switch?
A. Yes, sir.
Q. Then what did you do?
A. Backed in on the house track.

Q. With this one car?
A. Yes, sir.
Q. What is the next move you made?
A. Well, then we had orders—our switching list called for to take a car off that siding for Farnham, in the house track for Farnham; Farnham is the second station east. We cut the engine off and went around through the siding.

44 Q. That was clear?
A. Yes, sir.
Q. That is, you backed on it?
A. Backed up with the engine through the siding.
Q. Left this car on the house track?
A. Left this car on the house track.
Q. Then backed up on the siding?
A. Yes, sir.
Q. To what point? To the switch that runs into the house track from the west end, away out here (indicating)?
A. Yes, right here (indicating).
Q. Out here (indicating)?
A. Yes.
Q. Well, then, what did you do?
A. Well, we went in there and the car that we was to get for Farnham was the car west of the car with the drawbar out.
Q. West of the car with the drawbar out.

Mr. Ward: I will put a circle around this defective car. Have you any objection, Mr. Spratt?
Mr. Spratt: No.
Mr. Ward: That is our starting point all the while.

Q. Have you any memoranda of what that car was?
A. I haven't here but I have in the book.
Q. You haven't in your book?
A. I have in the train book.
Q. Was that it, the number the last witness put on the board?
A. I can't remember.
Q. But you know it was the next car west of the defective car?
A. Next car west of the defective car.
Q. Why didn't you take it out from the east end of the house track?
A. Because the drawbar was out of the west end of that car and you couldn't handle it.
Q. You found that out after you got there?
A. Yes, sir.
Q. Went and looked at it?
A. Why——

45 Q. Or did somebody tell you?
A. Yes, the drawbar was out of the west end of that car; we would have no way of getting our car out.
Q. That means, I suppose, that you could not pull that car out because the connection between the defective car and the car you wanted could not be made?

A. Yes, sir.

Q. So that you had to move around to the other end of that car where you could hook onto it?

A. Yes, sir.

Q. And where the connections between that car and those cars between you and it could be made?

A. Yes, sir.

Q. These cars, in order to handle them they have to be coupled together, have they not?

A. Yes, sir.

Q. And when they are in proper condition they are equipped with couplers that couple automatically on impact?

A. Yes, sir.

Q. Push them together they lock?

A. Yes.

Q. When you want to take them apart you step up to the side and pull the handle?

A. Raise the lever.

Q. And when cars are in perfect condition the couplers come together?

A. Yes, sir.

Q. That keeps the bodies of the cars apart, does it not?

A. Yes, sir.

Q. How far apart are the bodies of the cars when the couplers are in good condition?

A. You mean the center of the car?

Q. Ends; the ends of box cars?

A. Oh, I don't know; they must be a couple of feet in there.

Q. If this car had not been in defective condition, would you have drawn your car out from the east end?

A. Yes, sir.

Mr. Spratt: Objected to as incompetent and immaterial and I ask that the answer be stricken out.

46 The Court: Well, it is not very material. I will let it stand.

Mr. Spratt: Exception.

Q. How many cars were there west of the defective car on that siding?

A. I think it was six cars.

Q. Were they all coupled together?

A. Yes, sir.

Q. You found all the cars coupled together there except between the defective car and the next one west of it?

A. Yes, sir.

Q. And after you passed your engine west over the siding you backed in there on the house track and coupled up to all those cars?

A. Coupled onto the cars that was on the house.

Q. Onto the six cars?

A. Yes, sir.

Q. Which included all the cars east as far as the defective car?

A. West of the defective car.
Q. West of the defective car, all the cars west of the defective car?
A. West of the defective car.
Q. Then you pulled them out?
A. Yes, sir.
Q. What did you do with the car you wanted?
A. Kicked it down the side track.
Q. That means that you drew all that string of cars onto the siding and by the switch point?
A. Yes, sir.
Q. And then your engine backed up?
A. Went ahead, what we call going ahead; it was headed east.
Q. Went ahead toward the east?
A. Yes, sir.
Q. Then you cut that one car loose?
A. Cut that one car loose.
Q. And stopped the engine?
A. Stopped the engine.
Q. Which stops the other cars?
A. Yes, sir.
Q. And then the car that is cut loose, not being stopped by the engine, goes of its momentum onto the place you want it
47 to go?
A. Yes, sir.
Q. That is what is called kicking a car?
A. Yes, sir.
Q. Then what did you do with the other five cars that you did not have any use for?
A. Well, sir, we kicked two of them in on the grape track.
Q. You had orders for that?
A. Yes, sir.
Q. That is the same process that I mentioned with the other car?
A. Yes, sir.
Q. Then what did you do with the remaining three?
A. Kicked the other three back on the house.
Q. Was that also in accordance with orders you had?
A. Yes, sir.
Q. That was done in the same way?
A. Yes, sir.
Q. How is that grade there, which way?
A. Well, it is a little inclined to be down grade east.
Q. West higher and east lower?
A. Yes, sir.
Q. So that when you kicked these three cars back toward the defective car on the house track they were going down hill?
A. Well, we call it pretty near level; it can't be much of a hill.
Q. Down slight grade?
A. Down slight grade.
Q. And did your engine cut loose from those three cars?
A. Yes, sir.

Q. How far from the point where your engine cut loose from those three cars was the defective car?

A. About five or six cars.

Q. Five or six cars. So that there was how much space between your last car and the defective car when the engine let go of them?

A. Well, that is about the distance, about five or six cars.

Q. So that the last car had to travel five or six cars?

A. The last car that he—the last car of the string had to travel about five or six cars.

Q. Before it got to the defective car?

A. Yes, sir.

48 Q. And was it your purpose to put the string up against the defective car where you had taken it from?

A. Yes, sir.

Q. Why did you do that?

A. Leaving them on the same track.

Q. Are you supposed to keep the cars up close together?

A. We are supposed to keep all cars close together, coupled together when we get through.

Q. They are supposed to be left coupled together?

A. Yes, sir, but this car wasn't supposed to be left together.

Q. Because you couldn't couple it?

A. Because we couldn't couple it; there was no coupler there.

Q. Was that your practice to put it up against the other car?

Mr. Spratt: I object to that as leading and suggestive.

Q. Is that correct?

A. No, sir, to leave it in to clear the side track. the three cars.

Q. Who decides how much of a kick to give those cars?

A. The man that is working the middle of the train, my foreman.

Q. Sir?

A. My foreman.

Q. Well, the amount of force that is applied to those cars depends on the engine, does it not?

A. All by a signal given to the engineer.

Q. By the engineer?

A. Yes, sir.

Q. And was there anyone on those three cars?

A. Yes, sir.

Q. Who was on the three cars?

A. Mr. Lang.

Q. Was that his duty?

A. Yes, sir.

Q. What was he on the three cars for?

A. To ride them in.

Q. What did he have to do up there?

A. Set the brake to stop them when they got into clear.

Q. By getting into clear, you mean?

A. The side track.

49 Q. Did you notice where he was riding?

A. Well, I didn't notice where he was riding; I noticed he got on that head car.

Q. Did he get on the car before——

The Court: The one that would come up, the one nearest to the crippled car as they moved along?

Q. That is what you mean, is it not?
A. That is what I mean, the one nearest the cripple.
Q. Did he get on before the cars were started, or after?
A. After they were started.
Q. Is that customary in railroading?
A. Yes, sir.
Q. And does the brakeman usually ride the head car?
A. Ride any place he can get on to stop the cars when we are switching cars.
Q. That is, if there is anything on the track or any obstacle in the way and he is riding on the head car he can see it better?
A. He can see it.
Q. He had to travel, you say, five or six car lengths to reach the defective car?
A. Yes, sir.
Q. Did you notice the cars after the engine kicked them down in toward——
The Court: To operate the brakes did he have to climb to the roof of the car?
The Witness: Yes, sir.
Mr. Ward: What did your Honor say?
The Court: I say, to operate the brakes, did he have to climb to the roof of the car.
Q. Is that correct; you have to be on the roof of the car to operate the brakes?
A. The box cars you do but coal cars you don't.
Q. These were box cars?
A. These were box cars.
Q. The defective car was a box car?
A. The defective car was a box car.
50 Q. Did you look at that defective car before the accident?
A. Did I look at it before the accident?
Q. Yes.
A. Well, not that day I didn't.
Q. Had you seen it there before?
A. Yes, sir.
Q. Was the whole drawhead out?
A. Yes, sir.
Q. How long had you noticed it there in that condition?
A. Oh, about two trips, I think it was; about four days; three days.
Q. You make a trip every other day?
A. Every other day; up one day and down the next.
Q. And on two previous trips you had seen it?
A. Yes, sir.
Q. In the same place or a different place on that siding?
A. Different place.
Q. In doing your switching work there had you had occasion to move that around?

A. Once.

Q. That is, it is sometimes necessary to make room for your other cars and handle your business?

A. Yes, sir.

Q. And on this occasion you figured on making this movement without handling the defective car?

A. Yes, sir.

Q. Where did you stand when this last kicking movement was made?

A. At the switch.

Q. Which switch?

A. The side track switch that leads into the freight house—or not the side track switch; the grape track switch that leads off the house track.

Q. And that was about how many car lengths from the place of the accident?

A. Oh, about—that is about, oh, I should judge about four cars.

Q. Did you see Mr. Lang up there?

A. I saw him when he got on the car.

Q. How far was his car from the defective car when he got on?

A. Well, about—well, it was pretty near four car lengths; he got on pretty near where I was.

51 Q. And how fast was the string of cars going at that time?

A. Why, I don't know. Not very fast; just an ordinary kick, what they call kicking a car.

Q. Of course, there is no other force applied to those cars except the force that the engine applies to them, is there?

A. That is all.

Q. Then what happened?

A. Well, he—when he got on there and rode that car in, we were through there then with that track, so we started down to get hold of this car that we switched out to take to Farnham.

Q. The one that you had kicked down on the siding?

A. He kicked down on the side track.

Q. That is the one you pulled out?

A. Yes, sir. One of my brakemen got on.

The Court: That stood at that time where?

Q. That stood at that time where?

A. On the side track.

Q. East or west of the defective car?

A. It was just a little bit east of the defective car, the other side of it.

Q. Just beyond the defective car, standing still?

A. Yes, sir.

Q. You started with your engine down the siding, did you?

A. Yes, sir.

Q. You were riding on the engine?

A. I was on the steps of the engine.

Q. Then what did you find out?

A. Well, the brakeman got on the front of the engine, that is the pilot.

Q. What is his name?

A. George Chessel.

Q. Where had he been during this last movement?

A. He was cutting the cars off, parting them.

Q. So the crew consisted of Mr. Lang who rode, yourself who handled the switches, your brakeman who cut the cars off
52 and engineer and fireman who operated the engine?

A. Yes, sir, and the flagman.

Q. Where was he?

A. Back at the rear end.

Q. Protecting the train?

A. Yes, sir.

Q. So that he did not have anything to do with this switching movement?

A. No, sir.

Q. He was there to see that something did not come along and run into you?

A. Yes, sir.

Q. So that placed you up on the engine and Mr. Chassel up on the engine. What did you find when you came down there?

A. When we came down where the cripple was, I didn't see him when I went by but the brakeman jumped off the pilot of the engine; seen him standing there; he hollered something; I don't know what it was.

Q. I do not suppose Mr. Spratt wants you to say what was said.

A. Well, I jumped off the train — found him standing there on that footboard.

Q. Were the cars in contact?

A. No, sir.

Q. They were not in contact at that time?

A. No, sir.

Q. How close was the head car of this string that had been kicked in to the defective car at that time?

A. Oh, I don't know; they must have been about two or three feet apart.

Q. Had you heard the cars come together as they had been kicked down there?

A. Yes, sir.

Q. You heard that?

A. Yes, sir.

Q. And was there sufficient space where the drawbar was out and the coupling to permit the coupling and drawbar of the next car to get into that space?

A. Why, it couldn't go in there on account of the sills on the car.

Q. How close could the cars come together?

A. Well they came together so the running boards would meet together.

Q. So that the running boards——
A. Yes, sir.

53 By the Court:

Q. What do you mean by the running boards, the boards on top of the roof?
A. Yes, sir, extends over the top of the car.
Q. The boards that you walk on in going from one car to the other?
A. One car to the other, stepping from one car to the other.

By Mr. Ward:

Q. In the railroad business these running boards are out on top of the car?
A. They are put on top of the car and extend over about seven inches on each end.
Q. So that there is not so big an opening to step over?
A. To step over.
Q. That is provided by the regulations of the railroad Interstate Commerce Commission, as you understand it?
A. Yes, sir.
Q. That they shall project out six or eight inches?
A. Yes, sir.
Q. That is your understanding?
A. Yes, sir.
Q. And these cars were so equipped?
A. Yes, sir.
Q. When the couplers are in proper condition and come together, how much space is there left between the running boards?
A. Just an ordinary step.
Q. Two or three feet?
A. Two or three feet; like you take an ordinary step, about like this (illustrating).
Q. With the cars, in the condition in which they were can the running boards come together?
A. In the condition they were?

Mr. Spratt: I object to that.

Q. Yes.
A. Yes, sir.

Mr. Spratt: Exception. Immaterial, and calling for the conclusion of the witness.

54 Q. And did you see the deceased up on top of the car then?
A. See what?
Q. The dead man, or Mr. Lang.
A. Did I see him?
Q. Was he up there then?

A. Yes, sir. He wasn't on top of the car; he was standing on that step.

The Court: What step?

Q. Now describe that step to us.
A. There is a little step extends out where the brake is on all refrigerators; it is for to set the brake; I suppose that is what it is put there for, to stand on when you set the brake.
Q. That is on the end of the car?
A. End of the car where the brake is.
Q. And is the brake on both ends of one of those cars?
A. No, sir.
Q. Only on one end?
A. One end.
Q. So that to brake that refrigerator car a man had to be on that end?
A. Yes, sir.
Q. And to put the brake on you would step down on a little shelf which is some distance below the top of the car and on the end of the car?

Mr. Spratt: I object to that as leading and suggestive.
Mr. Ward: Well, it is leading but I am only describing what we cannot dispute, either of us.
The Court: Is that the proper description?
The Witness: Of that step?

Q. Yes, sir.
A. Why, the step is put there for—I don't know whether it is for that purpose or not but I can't see anything else it is put there for.
Q. How far below the top of the car is that?
A. If I stand on it, it comes to my knee.
55 Q. About eighteen inches?
A. It is about that.
Q. It is on the side or the end of the car?
A. It extends a little way from the middle of the car and a little way from the end of the car, about in the middle, in between.
Q. How close to the running board that projects out?
A. Well, the same as the running board about like that and that little step like that (indicating).
Q. Three or four inches from the outside of the running board?
A. Something like that.
Q. Does some part of the step project underneath the running board?
A. No, sir.
Q. It comes three or four inches from the edge or the running board?
A. Yes, sir.
Q. Did you get up on top of the car?
A. Yes, sir.

Q. You saw there was some trouble there, I suppose?
A. Yes, sir.
Q. What could you see of this man?
A. Well, I saw him standing there when they stopped the train, got off and I saw that he was hurt.
Q. Did you see any evidence of injury from the ground—could you?
A. Why, from the blood coming from his leg.
Q. Where was his leg?
A. Hanging down like that (illustrating).
Q. Hanging down off the end of that?
A. Off the little step.
Q. How was he supporting himself?
A. He was hanging onto the brake and was facing west.
Q. Facing west hanging onto the brake; that is his back was to the defective car?
A. Back was to the defective car.
Q. Had one foot on this little step?
A. One that was on and the one that was injured was hanging down like that (illustrating).
Q. Which foot was on the step?
A. If I ain't mistaken, I think it was the left, but I am
56 not sure about it.
Q. The other foot was hanging down?
A. Yes, the other foot was hanging down.
Q. What did you do?
A. Well, I got up on top of the car as quick as I could and Mr. Chissel there was up there before I got there.
Q. Climbed up the ladder?
A. Climbed up the ladder.
Q. These cars, I suppose, are 10 or 12 feet high?
A. Oh, yes.
Q. Did you notice the condition of the running boards when you got up on top?
A. Yes, sir.
Q. What did you see about the running boards on this car?
A. Well, I saw the running board, the refrigerator running board was cracked back in the middle of the car; not quite the middle.
Q. What, sir?
A. Kind of cracked, splintered; got heaved up like that (illustrating).
Q. Got heaved up from the end?
A. Yes, sir.
Q. That is the car upon which Mr. Lang was riding?
A. Yes, sir.
Q. Did you notice anything about the condition of the running board on the defective car?
A. I didn't notice any defect there but you could see each mark in between the running boards.
Q. Where the ends had come in contact?

A. No, sir,—where the ends came in contact?
Q. Where the ends came in contact?
A. Yes, sir.
Q. Of the running board?
A. Yes, sir.
Q. Where the running board on Mr. Lang's car had been buckled there?
A. No, sir, not on the end; in the middle of the car.
Q. Shoved back and then buckled up?
A. Struck like that and then heaved up like that (indicating).
Q. Did you notice whether there was any blood or anything of that sort on the ends of that running board?
57 A. There was no blood there; there was just a little mark there like as if it was caused by something hard in between it.
Q. I think I have asked you this but I want to be sure. If that coupler had been in proper condition could those running boards have come together?
A. No, sir.

Mr. Spratt: I object to that as I did before.
The Court: Yes. I overrule the objection.
Mr. Spratt: Exception.

Q. And how far apart would they have been if the cars had coupled automatically on impact?
A. How far apart?
Q. How far apart would the ends of those running boards have been if the cars had coupled automatically on impact?
A. As I said before——

Mr. Spratt: I object to that as entirely speculative, incompetent. No intention of coupling these cars.
The Court: I think he may testify how far apart.

Q. How far apart would they have been if the cars had coupled on impact, in inches or feet?

Mr. Spratt: Exception.

A. On top?
Q. Yes, ends of the running boards?
A. I should judge about—oh, about a foot.
Q. What did you do with Mr. Lang?
A. Well, we got up on top of the car and I got a bell rope and tied up his leg as quick as we could; had to go to get some blankets, get a rope to wind him in to get him down, called the doctor at Silver Creek; got my train switched out and got the caboose
58 and went back to Dunkirk as quick as we could.
Q. Was he conscious during that time?
A. Yes, sir.
Q. Appear to be suffering?
A. No, sir.
Q. Well, was his leg broken?

A. Well, I couldn't say whether it was or not.
Q. Did it flop?
A. No, sir; didn't leave it flop; I had him tied up so that it couldn't.
Q. Had him tied up so tight?
A. Yes, sir.
Q. Was the brake set on that car?
A. Yes, sir.

Cross-examination.

By Mr. Spratt:

Q. About what time did this accident happen?
A. 11.25.
Q. That is in the day time, just before noon?
A. Yes, sir.
Q. You say that you had moved this defective car before in the yard?
A. My men had moved it, yes, sir.
Q. And that included Mr.——
A. Mr. Chessel.
Q. Mr. Lang and Mr. Chessel?
A. Mr. Lang and Mr. Chessel, yes, sir.
Q. And at the time they moved it was it defective?
A. Yes, sir.
Q. Was it in the same condition it was at the time this accident happened?
A. Yes, sir.
Q. And was the attention of the crew called to that defective car at the time you moved it out this day before the accident?
A. Yes, sir.
Q. Was Mr. Lang's attention called to it being defective?
A. Yes, sir.
Q. In what way was his attention called to it?
A. We notified—we all understood what we were going to do and about that car being defective was the reason we had to go around the west end to get the other car out.
Q. The ordinary way to get that car out was to take it out, you say, from the——
A. East end.
59 Q. —east end: that is, you would couple to these cars that were ahead of it?

Mr. Ward: Including the defective car.

Q. Including the defective car, and pull them all out to get to the car that was right next west of the crippled car?
A. Yes, sir, to the crippled car.
Q. But instead of doing that, you say on account of the car being crippled there, it was necessary to go in from the west end?
A. West end.

Q. To get this car that you were to take to Farnham?
A. Yes, sir.
Q. And so Mr. Lang was notified of that?
A. Yes, sir, we all had an understanding what we were going to do before we went in there.
Q. Do you know who coupled the engine onto these cars that were on the house track when you started to pull out this one?
A. It was either Mr. Chessel or Mr. Lang, either one of the two coupled it on.
Q. Then after you pulled these cars that were on the house track, that were west of this defective car, and you did the switching with the two cars, cut out two of the cars, and also this one that you were going to take with you, then it became necessary to put the balance, the three cars, in on the house track?
A. Yes, sir.
Q. And you say all that you had to do was to put them in on this house track so that they would be clear of the switch?
A. Of the switch.
Q. About how many cars space was there between this defective car and the switch point west of it before you put in the three cars?
A. From that car up to the switch, do you mean?
Q. Yes, sir.
A. When we went in with the engine?
60 Q. Yes. You said you had to put them in so that the three cars would be clear of the switch point. How far was it from that point of clearance down to where this defective car stood?
A. Well, to get my cars into clear would reach about four or five cars.
Q. But, I mean what space was there? Was there plenty of space?
A. There was plenty of space left after the cars were in there, yes, sir.
Q. You hauled out how many cars?
A. We hauled out six cars.
Q. Six cars you hauled out?
A. Yes, sir.
Q. And three of them you disposed of on other tracks?
A. Two we disposed of on other tracks and three went back on the same track.
Q. And one you took with you?
A. One I took to Farnham.
Q. So that there was additional space at least for three cars on the house track?
A. Two or three cars left over.
Q. So that it was not necessary to come up against the defective car, was it?
A. No, sir.
Q. There could have been a space left between the cars which were put in and the defective car?
A. Yes, sir, could have been.
Q. For at least three car lengths?
A. Yes, sir.

Q. You say that the cars were pushed in or nosed in by the engine just before the accident?

Mr. Ward: Kicked in.

A. What is that?

Q. They were kicked in or shunted in by the engine before the accident?

A. They were kicked in, the three cars was what we call kicked in; just cut the engine loose from the cars.

Q. And the brakeman who gets up to stop those cars, it is up to him to apply the brakes, is it?

A. Well, the way that we always work on the locals, they
61 use their own judgment in riding the cars; that is, what we call riding cars, that is getting on it to stop them; if they think the cars is going too fast, they get on, and if they will use their own judgment and they think it won't do any harm by kicking them in, they don't get on.

Q. Just where they will stop then will depend on how soon or how strong they apply the brakes?

A. Yes, sir.

Q. So that from the speed that these cars were kicked in there, as you saw them, and also from the point where you saw Mr. Lang get on, would there have been any trouble in stopping these three cars before they reached the defective car if you applied the brakes?

A. Well, that would be a hard question to answer. Some men can stop cars quicker than others.

Q. Well, he was a skilled man, was he not?

A. Well, yes, but—

Q. How many years experience to your knowledge had he had as a brakeman?

A. Well, he must have been there six or seven years, something like that; five or six years; four years.

Q. And I understood you to say he understood his business?

A. Yes, sir.

Q. So that it was up to him to apply the brakes as strong or as light as he wished?

A. Well, it was up to him to stop the cars if he could; if he couldn't stop them, he couldn't stop them.

Q. Well, he could see whether he could stop them or not?

A. Well, it was daylight.

Q. And if he saw he was going to run into this other car he could have stepped back, could he not, if he had been watching out?

A. He could if there didn't something happen to him.

Q. Well, I say, if he had been watching?

A. Yes, sir.

62 Q. As I understood you, you and your crew had moved this car on two different occasions before the accident?

A. My crew moved it.

Q. And that included Mr.—

A. Mr. Chesed and Mr. Lang.

Q. On both of these occasions this defect was in the car?

A. Yes, sir.
Q. Was it, so that they could see it?
A. Yes, sir.
Q. State whether they were around that car on both occasions so they could see it?
A. Yes, sir.
Q. Do you know that they did see it, from your conversation with them?
A. Yes, sir.

Mr. Spratt: I understood you to say, Mr. Ward, that the only negligence you claimed was on this defective car?
Mr. Ward: I said the only defect.
The Court: The only defect of the car, he said.
Mr. Spratt: Yes I just wanted—
Mr. Ward: That is the only one I know anything about. There may have been some defect in the brakes. That is up to you to explain; I don't know anything about that.

Q. You say on top of the New York Central car that collided with this car, about the middle of the car the running board had heaved up a little?
A. Yes, it was heaved up. It was cracked but that might have been done before this.

Mr. Spratt: I ask that the latter part be stricken out.
Mr. Ward: I consent.
The Court: Strike it out, if you want to.
Mr. Spratt: Yes; not responsive.

Q. Which you account for by the end boards of these two cars coming together?
A. Yes, that is the only way I could account for it.
63 Q. Looked as though it was a fresh heave?
A. Yes, sir.
Q. That was how far back from the brakes?
A. Oh, it was pretty near the middle of the car.
Q. That would be about how many feet back?
A. Well, about six feet; eight feet; maybe a little more.

Redirect examination.

By Mr. Ward:

Q. Was it the duty of Mr. Lang to prevent the cars from coming together, if possible?
A. Yes, sir.

Mr. Spratt: I object to that as incompetent, calling for a conclusion.
The Court: He may answer.
Mr. Spratt: Exception.

Q. I understood you to say in answer to Mr. Spratt's question that it was left to these men, if they thought the cars were going too fast, then they got on and tried to stop them?

A. Yes, sir.

Q. If they were not going fast enough to do any harm, they did not get on?

A. No, sir.

Q. When you saw Mr. Lang get up on this car what did he start to do right off?

Mr. Spratt: I object to that as leading and suggestive.

The Court: Did you see?

Q. Yes; if you can tell me what he did start to do when he got up there?

A. I didn't see him when he was on top of the car; I saw him getting on the car.

Q. Oh, you didn't see him?

A. I didn't see what he done; I saw him getting on the car.

Q. Do you know anything about the condition of the brakes on that car or string of cars?

A. No, sir.

64 Recross-examination.

By Mr. Spratt:

Q. Those cars that you took out from the siding were not in your train?

A. No, sir.

Q. And you only had charge of them while you were making that switching movement?

A. Yes, sir.

Mr. Spratt: That is all.

Adjourned until tomorrow morning, Tuesday, June 11, 1918, at 10 o'clock.

Tuesday, June 11, 1918.

GEORGE ERNST, was recalled as a witness in behalf of the plaintiff and testified on further cross-examination by Mr. Spratt as follows:

Q. Was it the intention of your crew to couple onto this defective car?

A. No, sir.

Q. Was it the intention to move or change this defective car in any way?

A. No, sir.

Mr. Spratt: That is all.

ANNA E. LANG, the plaintiff, was called as a witness in her own behalf and having been duly sworn testified on direct-examination by Mr. Ward as follows:

Q. You are the widow of the late Oscar C. Lang?

A. Yes.

Q. What was your husband's age at the time of his death?

A. Forty years old.

Q. What is your age?

A. Thirty-eight this month.

65 Q. When were you married?

A. Twenty years ago in February.

Q. Where did you live at the time of your husband's death?

A. Buffalo, N. Y.

Q. Whereabouts in Buffalo?

A. 110 Aldrich Place, South Buffalo.

Q. During your married life what business had your husband been engaged in?

A. Why, in our early married life he was in business.

Q. He was what?

A. In our early married life he was in business; he was a meat cutter by trade and then we sold that out; it wasn't paying; and Mr. Lang then worked here for a man by the name of Valentine for a short time.

Q. In the meat usiness?

A. Yes. And after that he worked for the International Railway Company a short time; then went for the New York Central, which would be eleven years last August.

Q. Went to work for the New York Central?

A. Lake Shore, rather.

Q. And did he work with them continuously from that time up to the time of his death?

A. Always; he never lost a day.

Q. What wages was he receiving shortly before his death?

A. Why, as near as I can remember, his wages would amount to from about a hundred to a hundred and ten; sometimes he averaged one hundred and twenty for the month.

Q. Running from a hundred to a hundred and twenty a month?

A. Yes.

Q. What did he do with his money?

A. Gave it all to me.

Q. What did your family consist of?

A. Raymond, thirteen; Dorothy, four; and John, two.

Q. Are these the children here (indicating)?

A. These are the children.

Q. Are they healthy children?

A. Practically, yes.

66 Q. Did you or your husband have any means of support for yourself or your family except your husband's labor?

A. No.

Q. Have you got any trade or business or——

Mr. Spratt: Objected to as incompetent, irrelevant and immaterial. Exception.

A. No, I never worked a day in my life outside of taking care of my family.

The Court: You object, Mr. Spratt?
Mr. Spratt: Yes.
The Court: Sustain the objection.

Q. Did these children reside with you and your husband up to the time of your husband's death?
A. Always.
Q. Were they supported by the money which your husband gave you?
A. Absolutely.
Q. What was the first you knew of your husband's accident?
A. Why, some man 'phoned me over my telephone.
Q. Did you go to Dunkirk?
A. Immediately.
Q. The accident happened about twelve o'clock on Thursday, I think.
A. Yes, about noon.
Q. And you got to Dunkirk about what time?
A. I couldn't reach there until four o'clock; we were delayed; the train was delayed very much on the way.
Q. Four o'clock on the same day?
A. Yes.
Q. Was your husband conscious?
A. He was, yes.
Q. Did he talk with you?
A. Yes, he said a few words.
Q. Did his twin sister Mrs. Johnson reach there?
A. The next morning at eight.
Q. Did he talk to her?
A. Yes, he greeted her.
Q. When did he die?
A. Half past five the following Saturday.
67 Q. Did he talk to you on Saturday?
A. Yes.
Q. Your oldest boy, did he talk to him?
A. Yes.
Q. Was his conversation intelligent so that you could understand what he was saying and he understand you?
A. For a few moments time, then he would become unconscious again.
Q. Did he appear to be suffering pain?
A. Not until the last afternoon, then he suffered intense pain.

Mr. Ward: Is it admitted he died as a result of the injury?
Mr. Spratt: Yes.
Mr. Ward: Mr. Spratt says it is admitted that he died as a result of the injuries he received on Thursday. I think under the

Federal Law you cannot prove funeral expenses, your Honor. Is there any more recent decision on that point your Honor is familiar with?

The Court: Not to my knowledge.

Mr. Ward: I know it was originally decided we could not prove funeral expenses under the Federal Act, so I won't prove them.

Q. What state of health did your husband enjoy before his death, Mrs. Lang?

A. He was always healthy.

Q. Did he work steadily?

A. Very steadily.

Q. Where do you live now?

A. 132 Lancaster Avenue.

Q. Before your husband's death, during his employment by the New York Central, how much time would he be home?

A. Why, sometimes he would be in—on the wayfreight, of course, the time is different; he would be in just over night; he would get in—they were supposed to always get in in the morning but they never do as a rule and he would not get home
68 much before seven or eight o'clock at night at that time, and he would go at five in the morning; somewhere around there.

Q. Well, was that a regular thing or was that only part of the time?

A. Always, on the wayfreight, as a rule.

Q. Well, did he have days off when he was at home?

A. No. You see, the opposite days were spent at Erie, Pa., that was the end of the line.

Q. Did he do anything around the house?

A. Yes; he was a wonderful man; he had a wonderful garden and lovely chickens and was very helpful to me.

Q. Did your husband make a garden?

A. Yes, every bit of it.

Q. And that helped feed the family?

A. Very much.

Q. Have you been doing that for——

A. For the last two years—three years I should say; going into the third year.

Q. I suppose the only one of your children that was in school at the time of your husband's death was the oldest boy?

A. Raymond, yes.

Q. What school was he going to?

A. 29 in South Park; he now goes to 56.

Q. Public school?

A. Yes.

Q. The other children are not old enough to go to school?

A. No. Dorothy is four; John is two.

Mr. Ward: You may ask.

Mr. Spratt: I have no questions.

Mr. Ward: I offer in evidence the Carlisle Ta-les of Expectancy showing the expectancy of the deceased at forty years to be 27.61 years.

I ask leave to amend the complaint to accord with the proof offered, to allege that the deceased—in paragraph 10 to add to the paragraph the following: "That the plaintiff as widow
69 and the three children were dependent on the deceased for their support."

Mr. Spratt: I object to that as incompetent——

Mr. Ward: Just wait until I finish it, Mr. Spratt.

Mr. Spratt: Yes.

Mr. Ward: "—and have been damaged by the loss thereof." The pleadings are in the state form and I simply make this formal technical amendment to comply with the decision that I noticed in the United States Court, which I do not think would be binding upon these courts because I suppose our own form of pleadings govern, but nevertheless I make that amendment to be on the safe side, as this is a very important case.

The Court: I will permit it.

Mr. Spratt: I object to it as incompetent and improper and another and different cause of action, and take an exception to the granting of the amendment.

Mr. Ward: That is our case.

Mr. Spratt: If the Court please, on behalf of the defendant the New York Central I move for a non-suit upon the ground that the plaintiff has failed to establish any cause of action against the defendant under the Federal Employers' Liability Act or under any other law and has failed to establish the cause of action alleged in the complaint; that no actionable negligence has been established against the defendant; that as a matter of law under the undisputed facts plaintiff's intestate assumed the risks and dangers of his employment and the risk of being injured in the manner in which he was; and that actionable negligence, if any is shown on the
70 part of the defendant, is not shown to have been the proximate or a contributing or concurring cause of his death; that the plaintiff's intestate is not shown to have been in a situation where the defect or absence of the drawhead coupler or drawhead operated in any way as a breach of duty imposed for his benefit.

There are a couple of cases I want to show your Honor; would you give me just a little time to get them? I am going to call up my office, and I ask one of the attendants to get me 238 U. S., page 243.

The Court: Mr. Ward furnished me with a brief in another case, the Kimball case, where that case is discussed and been quoted from, so I think I know something about that case.

Mr. Spratt: I will get this other case, this Devens case.

The Court: What is the holding in the Devens case?

Mr. Spratt: Was that he assumed the risk in riding upon this car.

Mr. Ward: That was not under the Safety Appliance Act, Mr. Spratt.

Mr. Spratt: If your Honor please, the distinction in this case is

that the accident in question is not under the Safety Appliance Act, because the car in question was not used nor was it intended to be used at the time in question in connection with the movements of this train. The car was standing there and the evidence was that they simply moved the cars away from it where it was, the car that was not connected with it, took that car out and afterwards returned the other cars, not intending to couple up or use these cars in connection with each other at all. So that I say the question of
71 the Safety Appliance Act is not in this case and it comes squarely under the Conarty case, which has not been overruled in any phase of the case under discussion.

The Court: Let me see the decision you have sent for first.

Mr. Spratt: It was the case of Bolt against Pennsylvania R. R.

Mr. Ward: That is not under the Safety Appliance Act.

Mr. Spratt: I say that that applies to that branch of when he was riding upon the car; I say that the Safety Appliance Act has no application to the case at issue here.

Mr. Ward: This authority did not pass on that question because there was not any question of the Safety Appliance Act involved in the Bolt case, as I understand it; it was a question of the Employers' Liability Act, and the Court simply passed on the charge of Judge Hazel as to the question of assumption of risk which, of course, remains under the Employers' Liability Act but is expressly removed under the Safety Appliance Act. I only mentioned that it did not seem to me this authority he had would affect this case.

The Court: As far as a man was riding on the engine.

Mr. Spratt: Yes, sir; this man was riding on the car; there is no difference.

The Court: They said he had nothing to do with the management of the train. In this case he was performing his duties.

Mr. Spratt: He was a member of the engine crew. I will just read that to you so that you will see. It says: "Where a duty is imposed for the protection of persons in particular situations or
72 relations a breach of which happens to result in injury to one in an altogether different situation or relation is not, as to him, actionable. * * * The evils against which these provisions of the Safety Appliance Act are directed are those which attended the old fashioned link and pin couplings where it was necessary for men to go between the ends of the cars to couple and uncouple them. * * * It was not intended to provide a place of safety between colliding cars, * * * and an employe of a railroad company not endeavoring or intending to couple or uncouple the car or to handle it in any way, but in riding on an engine that collided with it, is not in a situation where the absence of a coupler and drawbar prescribed by the Safety Appliance Act operates as a breach of duty imposed by that Act for his benefit."

That case, the Conarty case, and the case at bar are as near alike as you could possibly get two cases.

The Court: Of course, in the Layton case the Supreme Court used other language.

Mr. Spratt: The distinction between those two cases, in that case

they attempted to couple together two cars and the cars did not couple, the result being it drove these cars down that did not couple and ran over a man who was down at the other end.

Mr. Ward: Oh, no; they struck some other cars.

Mr. Spratt: Put in motion some other cars and the man was farther down and the accident arose. That arose from defective couplers and the cars were in active use. Here is nothing of that kind; this car was not in active use.

The Court: Of course in this Layton case the Court used this language:

73 "While it is undoubtedly true that the immediate occasion for passing the laws requiring automatic couplers was the great number of deaths and injuries caused to employes who were obliged to go between cars to couple and uncouple them, yet these laws as written are by no means confined in their terms to protection of employes only when so engaged. The language of the acts and the authorities we have cited make it entirely clear that the liability in damages to employes for failure to comply with the law springs from its being unlawful to use cars not equipped as required,—not from the position the employe may be in, or the work which he may be doing at the moment when he is injured. This effect can be given to the acts and their wise and humane purpose can be accomplished only by holding, as we do, that carriers are liable to employes in damages whenever the failure to obey these Safety Appliance Laws is the proximate cause of injury to them when engaged in the discharge of duty. The jury found that the plaintiff's case came within this interpretation of the statute, and the judgment of the Supreme Court of Georgia must be affirmed."

Mr. Spratt: That was where, as I say, the cars were engaged in active interstate commerce.

The Court: I will deny your motion now and hear what you have to say.

Mr. Spratt: Exception.

74 MARTIN CULLIGAN was called as a witness in behalf of the defendant and having been duly sworn testified on direct-examination by Mr. Spratt as follows:

Q. Where do you live?

A. Dunkirk, New York.

Q. You are in the employ of the New York Central?

A. Yes, sir.

Q. Were you in the employ of the New York Central?

A. Yes, sir.

Q. Were you in the employ of the New York Central at the time of this accident?

A. Yes, sir.

Q. In what capacity?

A. General foreman.

Q. Did you hear of this accident?

A. Why, I did shortly after it occurred; I received a message

from the superintendent to go to Silver Creek and make an inspection of the car.

Q. Has it been your duty for some time to inspect cars?

A. Yes, sir.

Q. How many years' experience have you had in that?

A. Twenty-three years.

Q. You went to Silver Creek?

A. Yes, sir.

Q. What day was it you went there?

A. To the best of my recollection it was on the third day of November. I didn't bring any—not knowing what I was coming for, I didn't bring any notes with me.

Q. How many cars did you inspect there?

A. Inspected two.

Q. What were those cars?

A. One was refrigerator and the other was a box car.

Q. You remember the number of the New York Central car? Did you hear it mentioned here as being one of the cars?

A. I believe I did. I think it was one 45285 or something like that.

Q. 152——

Mr. Ward: No, no; let him tell; this is important; he is the inspector.

75 Q. Have you got it there?

A. 152485 New York Central; I think that is as near as I can recall it; and the other was 2936 A. & W. P., Atlantic & West Point.

Q. What inspection did you make of those cars? For instance, take the first one you mention, the New York Central?

A. Made a general inspection.

Q. What do you mean by general inspection?

A. Covered the whole car, safety appliances and including running gear, condition of roofs, side doors, coupler and attachments, heights, etc.

Q. Brakes?

A. Yes, sir, so far as I was able.

Q. What did you find the condition of this New York Central car to be?

The Court: Is that the refrigerator car?

The Witness: Yes, your Honor.

Q. That is the refrigerator car?

A. To the best of my recollection.

Q. To the best of your recollection——

A. I found that the center running board had been shoved back so that where it joined onto the saddle about fifteen feet back it was raised up, and there was a nick in the center running board where it came in contact with something, some other car.

Q. Was the break, was this raising fresh, or what was it?

A. It was apparently a new break. Of course, it was two or three days after the accident occurred that I inspected it.

Q. And outside of that what did you find with reference to this car?

A. Nothing. The car was practically a new car.

Q. When you say "nothing," what do you mean?

A. There was no other damage done outside of,—well, that running board, of course, was splintered; I don't just remember
76 how far back it was splintered, where it had been jammed and shoved up.

Q. How were the brakes?

A. The hand brakes were all right. I was unable to make any test of the air, not having any power.

Q. That is, to make a test of the air you would have to have an engine?

A. Yes, sir.

Q. The testimony here is that at the time of the accident no engine was attached to the car.

A. Well, not when I made an inspection.

Q. Well, I mean the testimony here is that at the time of the accident there was no engine attached to the car.

A. Oh, I see.

Q. So that you examined under those same conditions?

A. Yes, sir.

Q. On the box cars or other cars, how many brakes or brake wheels are placed on them?

A. One.

Q. It is either one end or the other?

A. Well, there is a law; it is always on what they call the "B" end.

Q. That is where the cars are designated as "A" end and "B" end?

A. Yes, sir.

Q. And the end where the brakes are placed is called the "B" end?

A. The "B" end.

Q. Who was with you when you made your inspection?

A. Well, one of my inspectors, Mr. Hassett.

Q. Did you make an inspection of this other car, this A. & W. P. that you have spoken of?

A. Yes, sir.

Q. What did you find with that?

A. I found on the brake end of that car that the coupler was missing, both draft timbers were damaged, one of them, the rear one, was left on the axle and all the bolts were broken; the carrier iron bolts that holds up the coupler had pulled through the head block; and the brake shaft was so badly bent that we were unable to
77 make any test of the hand brake on it.

Q. Were these defects that you speak of plain?

A. Yes, sir.

Q. They could be seen by anybody?

A. Yes, sir.

Q. What distance away in daylight?

A. Well, I presume from eyesight that you could detect that quite a ways away if there was no obstructions in front of the car.

Q. Yes, assume there were no obstructions, how far could you see?
A. Well, they were plain.
Q. About how far away could you see them?
A. Oh, I imagine a person could see it for maybe a hundred yards.

Cross-examination.

By Mr. Ward:

Q. You did not test the brakes on this car, the first one that you spoke of, while it was in motion, did you?
A. The refrigerator car?
Q. Yes.
A. No, sir.
Q. It was standing still?
A. Yes, sir.
Q. So that whether the brakes actually would brake the car or not you could only tell by such examination as you could make of it while the car was standing still?
A. That was all I could tell by bringing up the brake to the wheels and releasing them.
Q. You had no chance to see whether they would work in motion?
A. I couldn't tell.
Q. The absence of this coupler on the defective car, did that permit the ends of the cars to come closer together than they otherwise would?
A. Yes, sir.
Q. Would it permit the ends of the cars to come so close together that the ends of the opposite running boards would touch?
A. Yes, sir.

78 Q. If the coupler had been in position on the damaged car, how much space would there be between the ends of the running boards?

A. Well, now, they vary; they go from 10 inches sometimes to 14 and 15.
Q. From 10 to 14 or 15?
A. All depends on the height of the cars; they vary; two cars of the same heights vary; but from 10 to 14 inches.
Q. So that in all cars it is not less than 10 and more than 14 inches space between them if they got couplers on?
A. Well, they might, I say, if the cars were evenly built.
Q. Were these cars?
A. Well, one of them was—the refrigerator car measured from top of rail to the running board 10 ft. 7½, and the A. & W. P. measured 9 ft. 3. That is the way we take our inspection, from the height of the rail to the running board—or not the running board but the brake step board.
Q. So that these running boards on these two cars would not have come together?
A. No, sir; one would come under the other.

Q. Then the running board on the refrigerator car was the highest?

A. Yes, sir.

Q. And what did that strike when it came up against the other car?

A. I couldn't tell you.

Q. How close together would the ends of the cars come?

A. The ends of the cars?

Q. Yes, sir, with that drawbar out, the coupler out?

A. Why, I imagine that it would come only to the end of the step board, the brake step board.

Q. Only to the end of the brake step board?

A. I imagine it would be on account of the coupler being missing and the other car being lower.

Q. So that the brake step board would come right up against the end of the other car?

A. Yes, brake step board of the refrigerator would come up against the end of the car, of the A. & W. P.

79 Q. And in ordinary operation when both couplers were in, they would be how far apart?

A. Well, now, they would run about 30 inches; Safety Appliances requires 12 inches of a clearance in both cars; that is, wide enough for a man to go through, and then there is the horn of the coupler amounts to about three inches back of it; about thirty inches there is a clearance between cars when they are coupled.

Q. And the way these cars were it would permit the brake step board to come right up against the end of the car?

A. I imagine that is right; they were half a mile apart when I made the inspection.

Q. Did you see any blood marks there?

A. I recollect one of the men pointed out that there were some blood marks on the top part of the coupler.

Q. That is about underneath the brake staff.

Redirect examination.

By Mr. Spratt:

Q. From the inspection that you made there with reference to the brake on the New York Central car and the way in which it handled, the wheel you could tell could you not, whether it would apply in a proper manner in case the car was in motion?

A. I should judge that it was in good working order.

Q. From your inspection and experience, that is all?

A. That would be my opinion, that it was in proper working order.

Q. Of course cars are of different heights, are they not?

A. Yes, sir.

Q. Some are——

A. Some are higher than others.

Q. From a flat car up to the highest automobile?

A. Yes; furniture cars and——
Q. So they come in all sizes?
A. They do, they come in all sizes; some ten, some twelve feet.

Mr. Spratt: That is all.

80 TIMOTHY HASSETT was called as a witness in behalf of the defendant and having been duly sworn testified on direct-examination by Mr. Spratt as follows:

Q. You were the one who went with the previous witness and made an inspection of this car?
A. Yes, sir.
Q. You are an inspector?
A. Yes, sir.

Mr. Spratt: Mr. Ward says there is no question about it.

Q. Did you find the same condition——
A. Same condition.
Q. —that existed there as testified to by the preceding witness Mr. Culligan?
A. Yes, sir.

Mr. Spratt: I offer this little sketch in evidence.

The sketch referred to was received in evidence as Defendant's Exhibit A.

Mr. Spratt: That is all.
Mr. Ward: No questions.
Mr. Spratt: The defendant rests.
Mr. Ward: No rebuttal. I will offer my letters of administration in evidence, dated the 13th day of November, 1917, appointing Anna E. Lang administratrix of the estate of Oscar C. Lang, issued by the Surrogate of Erie County.

The Letters of Administration referred to were received in evidence and marked Plaintiff's Exhibit 1.

Mr. Spratt: If the Court please, I move for the direction of a verdict on the same grounds I moved for a non-suit; upon the further grounds it now appears that the car in question which plaintiff's intestate was riding at the time of the accident, being New York Central refrigerator car 152485, was in good con-
81 dition at the time this accident happened; that the brakes and appliances were in good working order; upon the further ground that it is shown that there is no negligence whatever on the part of the defendant and that there is negligence and proximate negligence which caused or contributed to causing the accident on the part of the plaintiff's intestate, and that the negligence of the plaintiff's intestate was the sole, proximate and only cause of his death.

The Court: Well, now, there may be a question of law involved here such as you raise. I appreciate the point that you suggest. The Supreme Court of the United States has gone so far in these

classes of cases I feel that I have got to deny your motion and, subject to review, you know, if necessary, I will hold—which will probably be the best disposition for you—that liability has been established and it is only a question of damages.

Mr. Ward: I did not catch that, your Honor.

The Court: That liability has been established under the Safety Appliance Act and that it is only a question of damages. You want an exception?

Mr. Spratt: Yes.

Mr. Ward: Your Honor rules liability has been established?

The Court: Yes.

Mr. Spratt: Absolute liability?

The Court: Absolute liability, I assume there is no dispute over the question but what the plaintiff's intestate was injured by the coming of these cars together practically in the manner described by the witnesses. Of course the evidence shows that he knew and was told that that was a damaged car and the couplers were out of order, had been taken away, were gone, and, of course, to that extent you might say that, except for the Safety Appliance Act he would assume the dangers incident to the operation that was
82 being done there. I do not see there is any evidence of any defect in the refrigerator car that he was riding at the time that he was hurt. But for the present I am going to hold it is simply a question of damages, the extent.

Mr. Spratt: Comes solely under the——

The Court: Puts the question right up square, you know.

Mr. Spratt: You hold it is a Safety Appliance Act case?

The Court: Yes.

Mr. Spratt: Exception.

The Court: And, of course, I suppose it will be the duty of the jury to apportion the damages too under the Act.

Mr. Spratt: Yes, that of course I take exception to.

The Court: I just mentioned that so that you may be guided in your remarks to the jury.

Mr. Spratt for the Defendant and Mr. Ward for the Plaintiff summed up the case, after which the Court charged the Jury as follows:

Charge of the Court.

Gentlemen of the Jury:

The Court, in interpreting the law governing this case, has reached the conclusion that the plaintiff has made out a case of liability of the defendant and the only question for you to determine is the amount of damages. Nevertheless, it may be of interest to you as jurymen to know how this case differs from a great class of other cases which you have from time to time as jurymen to consider. The Constitution of the United States has conferred upon Congress the right to regulate commerce between states and in pursuance

of this general power conferred by the Constitution Con-
83 gress has enacted certain laws relating to railroads running from one state into another, who actually are our agents in interstate commerce. Among other acts that they have passed is what is known as the safety appliance act relating to the equipment of cars and trains engaged in interstate commerce, transportation of passengers and freight from one state to another.

I will now read you some of the provisions of one of those acts. Section 2 of what is commonly known as the safety appliance act provides that "it shall be unlawful for any such common carrier," that is, one engaged in interstate commerce, "to haul or permit to be hauled or used in its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, which can be uncoupled without the necessity of men going between the ends of cars." And Section 5 of this act provides that "after July 1st, 1895, no cars, either loaded or unloaded, shall be used in interstate commerce, which do not comply with the standard above provided for." Section 8 of the act provides that "any employe of any such common carrier who may be injured by any locomotive, car, or train in use contrary to the provision of this act shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive or car or train has been brought to his knowledge." Then the Federal Employers Liability Act further provides that "In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this act to recover damages for personal injuries to an employe, or where such injuries have resulted in his death, the fact that the employe may have been guilty of contributory negligence
84 shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employe: Provided, that no such employe who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employes contributed to the injury or death of such employe."

It is undisputed that a car with the coupler damaged was placed on what is known as the house track of the defendant's railroad at Silver Creek and that this coupler had been so injured that it had to be taken out; at the time of the accident there was no coupler at all or drawbar on the end of this car; and this car stood in on this track with some others, one or more of which the Company desired to take off the track and to put into the train which was picking up freight cars along the line, and in so doing they hauled out one car and then had to kick back or put back other cars onto the house track again.

In so doing the switch was turned and, I think, at the time three cars were, as they say, kicked by the engine moving them onto this house track. They had a little distance to run down to the place where they were to be stopped and Mr. Lang, the plaintiff's in-

testate, was a brakeman, one of the crew of this local freight train. It appears it was his duty and it was the custom for him, where it was necessary, to climb to the top of these cars as they moved along on this track and, where necessary, to set a brake to stop them at the proper point, and that on the day in question he climbed up onto what is known as a refrigerator car and had hold of the brake, was standing on the foot rest or foot platform, connected with the brake. He did not succeed in stopping the car, either on account of his own lack of care or the force with which it was
85 backed in there, or for some other reason—it is not material now anyway—and the refrigerator car came into contact with the freight car with the coupler gone and the result of it was that the ends of the two cars came together and his leg was so crushed that two or three days after he died as a result of the injuries.

Under the provisions of these sections of this act which I have called your attention to, you see, it is expressly provided that even though the injured party who has lost his life has been guilty of contributory negligence, that does not preclude a recovery on his part or on the part of his representatives, nor is he deemed to have assumed the risk incident to it. Remember in this case the p-aintiff's witnesses testified that Mr. Lang was told that there was that car without couplers on it but by the express provisions of the act he would not be deemed to have assumed the risk of operating it, so I have reached the conclusion, for the present any way, that the only question for you to determine is the amount of damages which his family has sustained by reason of his death. So eliminate all of these other questions from your consideration and get right down to the single question as to the financial loss which his wife and children have suffered by reason of this accident.

You are to take into consideration his earning capacity, what he actually was earning at the time of his death, how much he contributed to his family, how much of those earnings, in the natural course of things, he would require for his own personal expenditures, because, of course, he had to be clothed. I suppose certain expenses probably of food and other things were incident to his daily life. Then you are to take into consideration his expectation of life, the number of years which in the ordinary course of events he would naturally be expected to live. Of course, he might
86 die tomorrow or he might live beyond the probable expectancy which has been read. That is given to you as a guide, however, in determining what in the ordinary course of events a healthy man would be expected to live. Then you are to determine as best you can from all this data the amount of financial support which in the ordinary course of events the husband would have contributed to his family. I have this thing, however, to caution you against: You cannot capitalize your verdict. Just for illustration, not by way of any guide here, we will say a man earns a thousand dollars a year. We will say his expectancy is 20 years. You should not multiply a thousand dollars by twenty and render a verdict therefor for twenty thousand dollars, because you can see if

twenty thousand dollars were paid at the going rate of interest of, say, five per cent, the interest itself on the twenty thousand dollars would yield a thousand dollars a year which he was earning and at the end of the beneficiary's life you would not only have a thousand dollars a year but you would have the twenty thousand dollars in addition. That would be what I term capitalizing the verdict. But you are to render such a verdict by way of dollars-and-cents that in the long run, taking all these matters into consideration, would compensate those who have sustained damages by his death for his death. And that you will have to arrive at as best you can as business men and men of common sense. Of course, counsel and advice of the father to his children is also to be considered in determining the amount of the loss. You should take into consideration, of course, the possibility that the children might not survive childhood, that they may die before reaching manhood and womanhood.

All these things have got to be taken into consideration and
87 then you reach a verdict which you think is fair and just in this case.

Under this Federal law you are to apportion the damages. There are four persons interested in the outcome of this litigation. There is the widow and each of the three children varying in ages, the boy being thirteen, if I remember right, something like that, the little girl of four and the youngest child two. Therefore you will determine the extent of the damage to each one of these people. I have drawn for your guidance a form of verdict which I wish you to render. You say that "the jury say that they find a verdict for the p-aintiff in the sum of (blank) dollars and apportion said damages as follows, to wit, to Anna E. Lang, widow, (blank) dollars; to Raymond J. Lang, son, so much; to Dorothy M. Lang, daughter, so much; to John A. Lang, son, so much." Of course, I have arranged them in the order of their respective ages Mrs. Lang being at the top and the oldest boy next and the daughter who is four next and John A. Lang, the infant son of two, next. Therefore the total amount of your verdict, whatever it may be, should be first inserted in that blank; then you apportion it among the different parties interested as you think is right and just.

That is all I have to say to you, gentlemen, in this case.

Mr. Ward: May I ask your Honor to charge the jury that in fixing the loss to the family they may allow for the value of any services which the deceased would render his family apart from his wages?

The Court: Yes, that is true.

Mr. Spratt: Exception.

Mr. Ward: And I also ask your Honor to charge the jury that in fixing the damages and loss to the family they have a right
88 to consider any prospect of advancement or increased earning capacity which the deceased might have.

The Court: Of course, anything reasonable.

Mr. Ward: And I ask your Honor to charge the jury that in fixing the damages to the family they must consider solely the evidence here presented and that the verdict should not be reduced

or diminished because of any idea that the jury might have that it could be more readily collected.

The Court: Surely. That is not for you to concern yourself with.

Mr. Spratt: Exception to each of the requests and direction. Of course, I take an exception to the submission to the jury of any question of the defendant's negligence and ask the Court to charge the jury that under the facts in this case the defendant is not shown guilty of any actionable negligence.

The Court: Well, I have already ruled on that. Of course, that is to save your exception.

Mr. Spratt: Yes.

The Court: And I decline the request.

Mr. Spratt: Exception. I take an exception to your Honor's charge that the plaintiff's intestate is not deemed to have assumed the risk.

I also take exception to your Honor's charge that even though the plaintiff's intestate was guilty of negligence he could recover under the Safety Appliance Act.

The Court: That is all involved in your motion for dismissal.

Mr. Spratt: I except to the submission of any other question of negligence to the jury.

The Court: I did not submit any.

Mr. Spratt: No. You have taken it all away. That can go out, I think.

I ask the Court to charge the jury that if they find that the car in question had been placed in the position in which it was
89 at the time of the accident for the purpose of being unloaded and that if they find that the train crew were not attempting to couple onto the car in any way or handle it in any way, that the defect in or absence of the prescribed cupler and drawhead did not operate as a breach of any duty imposed for the benefit of plaintiff's intestate under the Safety Appliance Act and that no recovery can be had merely because the coupler or drawhead was defective.

The Court: I will decline your request.

Mr. Spratt: I ask the Court to charge that under all the circumstances in this case plaintiff's intestate assumed as a matter of law the risk of the cars upon which he was riding coming in contact with the standing car in question.

The Court: Denied. Give you an exception.

Mr. Spratt: Exception. I ask the Court to charge that if there was no breach of duty imposed for the benefit of plaintiff's intestate under the Safety Appliance Act the jury may find plaintiff's intestate assumed the risk of all dangers open and obvious and known to him, whether such risks followed from a failure to have in force a rule or rules or from the negligence of his employer or fellow servant.

The Court: Of course, if there was no violation then it would be true but I have held there was. I give you an exception.

Mr. Spratt: Exception. I ask the Court to charge that if the plaintiff's intestate knew of the location of the car in question and

knew that the coupler or drawhead on the same was defective that he assumed, as a matter of law, any risk arising from riding the cars in question in there on the track upon which such defective car stood and that there can be no recovery in this case.

The Court: I will decline the request.

90 Mr. Spratt: Exception. I ask your Honor to charge that the plaintiff's intestate assumed the risk of the cars being kicked into the siding with sufficient force to require the setting of brakes to prevent them coming in contact with other cars standing on the siding.

The Court: I will deny the request; and give you the exception.

Mr. Spratt: Exception. I ask the Court to charge that under the facts shown the plaintiff intestate's failure to set the brakes and -hereby prevent the cars coming into collision with the standing car in question was the sole proximate cause of the accident, which bars a recovery.

The Court: I will deny your request and give you the exception.

Mr. Spratt: Exception. I take exception to your Honor's ruling that the damages may be apportioned between the widow and the children and ask your Honor to charge the jury that the verdict must be one for one amount.

The Court: I will deny the request.

Mr. Spratt: Exception.

At 11:55 A. M. the jury retired for deliberation, returning into the court room with a verdict for the plaintiff in the sum of $18,000 apportioned as follows: To Anna E. Lang, widow, $7,000; to Raymond J. Lang, son, $2,500; to Dorothy M. Lang, Daughter, $4,000; and to John A. Lang, son, $4,500.

The foregoing is all the evidence taken and proceedings had upon the trial of this action, and because the same does not appear of record the defendant has caused the foregoing case and exceptions to be prepared to the end that this case may be further considered by this court.

LOCKE, BABCOCK SPRATT & HOLLISTER,
Attorneys for Defendant.

91 *Stipulation.*

It is hereby stipulated, that the foregoing case containing all the evidence taken and proceedings had upon the trial of this action may be settled, signed and ordered filed, by the justice before whom the same was tried, and that the same was tried, and that the same shall stand for all purposes as the original case herein.

It is further stipulated, that the above notice of appeal, judgment roll, case and exceptions, and order denying motion for new trial are true and correct copies of and from the originals thereof, entered and remaining on file in Erie County Clerk's office and certification of the same is hereby waived.

It is further stipulated, that the exhibits used, on the trial of

this action, may be used upon the argument thereof with the same force and effect, as though printed and made a part of this record.

Dated, November 4th, 1918.

JULIUS A. SCHREIBER,
Attorney for Respondent.
LOCKE, BABCOCK, SPRATT & HOLLISTER,
Attorneys for Appellant.

92 *Opinion.*

Supreme Court, Erie County.

ANNA E. LANG, as Administratrix, Plaintiff,

against

THE NEW YORK CENTRAL RAILROAD COMPANY, Defendant.

Motion by defendant for a new trial after a verdict for the plaintiff.

Maurice C. Spratt for defendant.
Julius Schreiber for plaintiff.

WHEELER, *J.:*

The plaintiff's intestate was a trainman engaged in interstate commerce as one of a train crew operating a wayfreight train between Erie, Pennsylvania and the City of Buffalo, New York. The cause of action is based upon an alleged violation of the Act of Congress known as the Safety Appliance Law.

The defendant had a loaded car loaded with iron which had been placed on a siding at the station at Silver Creek, New York. On the same track was also standing another car destined for Farnham, the next station east. At Silver Creek this wayfreight had orders to leave a couple of cars and to take on the car going to Farnham. The car loaded with iron above referred to was defective. The draw bar, the draft timber and the coupling apparatus on the westerly end of this car were gone. This car
93 had been on the siding at Silver Creek several days loaded with iron consigned to a firm at Silver Creek, waiting to be unloaded. Its condition was known to the crew of the wayfreight generally and to the plaintiff's intestate prior to the accident. In fact its crippled condition was the subject of conversations between him and the train conductor only shortly before the accident happened. In getting out the car for Farnham the engine went onto the siding from the westerly end, pulled out a string of six cars including the Farnham car, then shunted the Farnham car onto an adjoining track, placed two of the other cars they had hauled out onto a third track, and then kicked the other three cars back onto the track where the crippled car stood. Plaintiff's intestate

was on one of these three cars for the purpose of setting the brakes and so placing them on this siding so as not to come into contact with the crippled car. He evidently was at the brake on the easterly end of the easterly one of the three cars moving toward the crippled car. His foot was resting on the small platform at the end of the car just below the brake wheel. For some reason he did not stop the three cars moving on this track before the cars came into contact with the crippled car. The cars collided, and owing to the absence of the coupler attachment and bumpers on the crippled car intestate's leg was caught between the ends of the two cars and he was so injured that he died from the injuries so received.

It evidently was not the intention of any of the crew to disturb, couple onto, or move the crippled car. The defendant contends that it is not liable for the accident; that the plaintiff, under the circumstances of the case is not entitled to invoke the provisions of the Safety Appliance Act of Congress, and that the acci-
94 dent was caused solely by the negligence of plaintiff's intestate in neglecting to properly brake the cars on which he was riding at the time of the accident. At the trial the Court took the view that the accident was due to the failure of the defendant to comply with the Federal Statute, that the liability imposed was an absolute one, and a case had been made out within the statute, and the only question remaining was for the jury to fix the amount of the damages sustained.

The jury accordingly found for the plaintiff, assessing the damages as follows to

Anna E. Lang, Widow	$7,000.00
Raymond Lang, Son	2,500.00
Dorothy Lang, Daughter	4,000.00
John A. Lang, Son	4,500.00
In all	$18,000.00

A motion is now made for a new trial in which the trial court is asked to review its rulings.

The defendant contends that upon the undisputed facts the plaintiff's intestate and his representative cannot invoke the provisions of the Safety Appliance Statute relating to car couplers.

The Safety Appliance Act provides:

(Section 2) "It shall be unlawful for any such common carrier (one engaged in interstate commerce) to haul, or permit to be hauled or used in its line, any car, used in moving interstate traffic not equipped with couplers coupling automatically by impact and which can be uncoupled without the necessity of men going between the ends of the cars."

Section 5 of the act provides that the Interstate Commerce Commission shall provide a standard height for drawbars, "and
95 after July 1, 1895 no cars, either loaded or unloaded, shall

be used in interstate commerce which do not comply with the standard above provided for."

In October, 1910, the Interstate Commerce Commission made an order relative to drawars, stating the maximum and minimum height thirty-four and one-half inches and thirty-one and one-half inches.

Section 8 of the original act provided that any employee of any such common carrier who may be injured

"by any locomotive, car or train in use contrary to the provision of this act, shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car or train had been brought to his knowledge."

The Federal Employer's Liability Act, which applies here, as both parties were engaged in interstate commerce, provides:

Section 3: "In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this act to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee; provided, that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such
96 common carrier *or* any statute enacted for the safety of employees contributed to the injury or death of such employee."

Defendant's counsel contends that the discussion of the United States Supreme Court in the case of St. Louis & San Francisco Railroad Company vs. Conarty, Administrator, 238 U. S., 243, lays down a rule of law interpreting the statute which releases the defendant from liability in this case.

In the Conarty case an employee of a railroad not endeavoring or intending to couple a car having defective couplers, or to handle it in any way; was riding on a foot-board of an engine which collided with it, and was killed in the collision.

It was held that the employee was not in a position where the absence of a coupler and drawbar prescribed by the Safety Appliance Act of Congress operated as a breach of duty imposed by that act for his benefit; that the evil against which the coupler provisions of the Safety Appliance Act are directed are those which appended the old-fashioned link and pin coupler where it was necessary for men to go between the ends of cars to couple and uncouple them, and was not enacted to provide a place of safety between colliding cars. It is urged by defendant's counsel in this case that it was not intended in the switching operations carried on at the time plaintiff's intestate was killed to couple onto the crippled car, and therefore within the rule laid down in the Conarty

Case the defendant cannot be held liable. It is doubtful whether a United States Supreme Court ever intended to go as far as the expressions of the opinion in the Conarty case might indicate. As to the Conarty Case we think it may be said that the United States Supreme Court in the later case of the Louisville & Nashville Railroad vs. Layton, 243 U. S. 617, has restated the rule of law,
97 which is to govern in these cases. The rule laid down in this later case is summarized in the head note as follows:

"Under the Federal Safety Appliance Acts carriers in interstate commerce are liable in damages to their employees injured in the discharge of duty, whenever the failure to comply with those acts is approximate cause of injury and without reference to the physical position occupied by the employee, or the nature of the work upon which he is engaged, at the time when the injury occurs."

In that case the Court upheld a recovery where failure of couplers to work automatically in a switching operation resulted in a collision of cars from one of which the plaintiff was thrown to his injury while preparing to release brakes. There the brakeman injured was on a standing train, which was struck by other cars kicked against it owing to the failure of a defective coupler to operate and couple onto a switching engine. Was the absence of a coupler on the standing car in this case the proximate cause of the accident to plaintiff's intestate. We think this question must be answered in the affirmative. Had there been proper couplers and bumpers on the standing car the two cars could not have come into immediate contact so as to have crushed the brakeman on the moving car. It seems to us the statute was enacted to prevent just such things happening, which every one must know are liable to happen when couplers are defective even though those moving cars intended stopping before the cars came into actual contact. That the rule laid down in the Layton case rather than that indicated in the
98 Conarty case should prevail is emphasized by the decision of the same court in the Gotshall case, 244 U. S., 66, where the intestate brakeman was proceeding along the tops of the cars toward the locomotive when the train started because of the opening of a coupler on one of the cars, resulting in an automatic setting of emergency brakes and a sudden jerk which threw the brakeman off the train and under the wheels.

Holding as we did at the trial and now again upon a review of our rulings that the statute in question applies, and as the liability imposed by the statute is an absolute one.

St. Louis Iron Mountain & Southern Railway Co. v. Taylor, 210 U. S., 281.

Chicago, Burlington & Quincy Railway Co. v. United States, 220 U. S., 559.

Texas & Pacific Ry. Co. v. Regsby, 241 U. S., 33.

Minneapolis & St. Louis Rd. Co. v. Gotschall, 244 U. S. 66.

We think the crippled car while it stood on the siding at Silver Creek must be deemed to have been in use within the meaning of

the statute. It was there for the purpose of being unloaded, on a track where the evidence shows cars were daily being moved back and forth.

The Supreme Court of the United States has held that a carrier is not relieved from liability under the statute even where the defective car is being hauled to the nearest available point for repairs.

Great Northern Ry. Co. v. Otos, — U. S., 349.

Where such is the holding it would be idle to contend we think, that a car placed on a switch to be unloaded was not still in
99 use within the meaning of the act. The trial court had no alternative but to instruct the jury, as it did, that the defendant's liability had been established and it only remained for them to assess the damages.

It is contended the verdict is excessive. It certainly seems large, but I am not disposed to disturb it, especially as this case will beyond doubt be appealed. If the Appellate Division should be of the opinion the verdict is too large that court may reduce the amount to such sum as it thinks right.

The defendant's motion for a new trial should be denied.

Order Settling Case.

The foregoing case containing all the evidence taken, and proceedings had upon the trial of this action, is hereby settled by me, as above set forth and ordered filed in the Erie County Clerk's office.

Dated, November 4th, 1918.

CHARLES B. WHEELER,
Justice Supreme Court.

100 *Order of Affirmance.*

At a Term of the Appellate Division of the Supreme Court of the State of New York Held in and for the Fourth Judicial Department in the City of Rochester, N. Y., Commencing on the 7th Day of January, 1919.

Present:
Hon. Frederick W. Kruse, Justice Presiding.
Hon. Nathaniel Foote, Hon. John S. Lambert, Hon. Pascal C. J. De Angelis, Hon. Irving C. Hubb, Associate Justices.

ANNA E. LANG, as Administratrix of the Goods, Chattels and Credits of Oscar C. Lang, Deceased, Plaintiff-Respondent,

vs.

NEW YORK CENTRAL RAILROAD COMPANY, Defendant-Appellant.

The above named New York Central Railroad Company, defendant in this action, having appealed to the Appellate Division,

Supreme Court, Fourth Department, from a judgment of the Supreme Court entered in the office of the Clerk of the County of Erie on the 12th day of June, 1918, and from an order denying
101 defendant's motion for a new trial entered in said clerk's office on the 23d day of October, 1918, and said appeal having been argued by Mr. H. W. Huntington of counsel for appellant, by Mr. Hamilton Ward of Counsel for respondent, and due deliberation having been had thereon, it is hereby

Ordered, that the judgment and order so appealed from be and the same hereby are affirmed with costs.

All concur except Foote, J. who dissents and votes for reversal upon the authority of St. Louis & San Francisco R. R. Co. v. Conarty, 2338 U. S. 243.

Entered 5th day of March, 1919.

NEWELL C. FULTON,
Clerk.

Enter.

FREDERICK W. KRUSE.

102 *Judgment of Affirmance.*

Supreme Court, Erie County.

ANNA E. LANG, as Administratrix of the Goods, Chattels and Credits of Oscar C. Lang, Deceased, Plaintiff-Respondent,

vs.

NEW YORK CENTRAL RAILROAD COMPANY, Defendant-Appellant.

The appeal taken by the defendant New York Central Railroad Company from a judgment entered in the office of the Clerk of the County of Erie on the 12th day of June 1918 and from an order denying defendant's motion for a new trial entered in said Clerk's office on the 23d day of October, 1918, having been brought on for a hearing at the Appellate Division, Supreme Court, Fourth Department in the City of Rochester, N. Y. at a term of said Court commencing on the 7th day of January, 1919, and an order of said Appellate Division having been thereafter and on the 5th day of March, 1919, made and entered affirming said judgment against the said defendant New York Central Railroad Company, with costs of said appeal to the plaintiff respondent herein, and all of the judges concurring therein except Foote J.,

Now, on motion of Julius A. Schreiber, attorney for respondent, it is hereby

103 Adjudged, that the said judgment against said New York Central Railroad Company be and the same is hereby in all respects affirmed, and that the plaintiff-respondent recover of the appellant New York Central Railroad Company the sum of $90.40 costs

and disbursements, and that she have execution against said defendant New York Central Railroad Company therefor.

Judgment signed this 12 day of March 1919.

EDWARD J. CLARK, *Sp. Dep. Clerk.*

104 *Notice of Appeal to Court of Appeals.*

STATE OF NEW YORK:

Supreme Court, Appellate Division, Fourth Department.

ANNA E. LANG, as Administratrix of the Goods, Chattels and Credits of Oscar C. Lang, Deceased, Plaintiff-Respondent,

against

THE NEW YORK CENTRAL RAILROAD COMPANY, Defendant-Appellant.

SIRS:

Please take notice, that the defendant, the New York Central Railroad Company, in the above entitled action hereby appeals to the Court of Appeals upon the judgment of the Appellate Division of the Supreme Court, Fourth Department, entered in the office of the Clerk of Erie County on the 8th day of March, 1919, which judgment affirmed with $90.40 costs the judgment entered in the office of the Clerk of Erie County, in the above entitled action, on the 12th day of June, 1918, in favor of the above named plaintiff and against the above named defendant, for the sum of $18,000.00 damages and $70.83 costs, and which said judgment of the

105 Appellate Division also affirmed the order entered in Erie County Clerk's office, on the 23rd day of October, 1918, which order denied defendant's motion for a new trial; and you will also

Please take notice, that the above named defendant, The New York Central Railroad Company hereby appeals to the Court of Appeals from an order of the Appellate Division of the Supreme Court, Fourth Department, entered in the office of the Clerk of the said Appellate Division, March 5th, 1919, and entered in the office of the Clerk of Erie County on the 8th day of March, 1919, which ordered and adjudged that the judgment and order in this action theretofore appealed from be affirmed with $90.40 costs of the appeal, and the defendant hereby appeals from the whole and each and every part of said judgment, and from the whole and each and every part of said order.

Yours, etc.,

LOCKE, BABCOCK, SPRATT & HOLLISTER,

Attorneys for Defendant.

Office & P. O. Address, 810-826 Fidelity Bldg., Buffalo, New York.

To Julius A. Schreiber, Esq., Attorney for Plaintiff, and to the Clerk of the County of Erie.

105 *Affidavit of No Opinion.*

STATE OF NEW YORK:

Court of Appeals.

ANNA E. LANG, as Administratrix of the Goods, Chattels and Credits of OSCAR C. LANG, Deceased, Plaintiff,

vs.

THE NEW YORK CENTRAL RAILROAD COMPANY, Defendant.

STATE OF NEW YORK,
County of Erie, ss:

Percy R. Smith, being duly sworn, says that he is an attorney associated with Locke, Babcock, Spratt & Hollister, attorneys for the defendant-appellant herein; that no opinion was written by the Appellate Division, when the said Court affirmed the judgment of the Supreme Court herein, as deponent is informed and verily believes.

PERCY R. SMITH.

Sworn to before me this 10th day of July, 1919.

J. E. KELLY,
Notary Public, Erie Co., N. Y.

107 *Stipulation.*

State of New York, Court of Appeals.

ANNA E. LANG, as Administratrix of the Goods, Chattels and Credits of OSCAR C. LANG, Deceased, Plaintiff,

against

THE NEW YORK CENTRAL RAILROAD COMPANY, Defendant.

It is hereby stipulated, by and between the attorneys for the respective parties herein that the foregoing copies of the remittitur, judgment and notice of appeal to the Court of Appeals and all other papers and documents in said case contained are true and correct transcripts of and from the originals now on file in the office of the Clerk of Erie County and in the office of the Clerk of the Appellate Division, Fourth Department, and that the same may stand upon this appeal with the same force and effect as if certified by the Clerk of said county, or of said Appellate Division, and

It is further stipulated, that any exhibits herein, whether in the record and made a part hereof or not, may be produced and used

upon the argument of this appeal with the same force and
108 effect as if printed and set forth in the printed case on appeal.

Dated, Buffalo, N. Y., July 10, 1919.

JULIUS A. SCHREIBER,
Attorney for Respondent.

LOCKE, BABCOCK, SPRATT & HOLLISTER,
Attorneys for Appellant.

Opinion of Judge Andrews.

ANNA E. LANG, *as* Administratrix, etc., Respondent,

v.

THE NEW YORK CENTRAL RAILROAD COMPANY, Appellant.

(Decided January 6, 1920).

Appeal from a judgment of the Appellate Division affirming a judgment of the Trial Term entered upon the verdict of a jury in favor of the plaintiff.

Maurice C. Spratt for appellant.

Hamilton Ward for respondent.

ANDREWS, *J.*:

Where disregard of the Safety Appliance Act causes loss to one of the class for whose special benefit it was enacted his right
109 to recover damages is implied, (Texas & Pacific Railway Company v. Rigsby, 241 U. S. 33.) Not so, as to others.

In St. Louis & San Francisco Railroad Company v. Conarty, (238 U. S. 243) a switch engine collided with a freight car having no coupler or drawbar. The switch engine was not to handle this car but was on its way to a point some distance beyond it. Conarty, standing on the foot-board of the engine, was killed by the collision. There was evidence that had the coupler and drawbar been present the engine and the car would have been held so far apart as to have prevented the injury.

The Supreme Court said that section 2 of the act was intended to provide against the risk of coupling and uncoupling and to obviate the necessity of men going between the ends of the cars. It was not intended to provide a place of safety between colliding cars. Therefore, when a collision was not the proximate result of the violation of these regulations, where there was no endeavor to couple or uncouple a car or to handle it in any way, there can be no recovery under the act. The absence of a coupler and drawbar was not a breach of duty toward a servant in that situation.

If, however, a collision was proximately caused by the failure of the railroad to obey the statute, it was not intended to hold that only those servants actually engaged in coupling or uncoupling
110 cars could recover for the resulting injuries. Any servant so injured equally comes within the protection of the statute.

(Louisville & Nashville Railroad Company v. Layton, 243 U. S., 617; Minn. & St. Louis R. R. Co. v. Gotschall, 244 U. S. 66.)

In the case before us the defendant was engaged in interstate commerce. A car without drawbar or coupler was standing on the siding. The plaintiff's intestate was a brakeman and was riding on a second car kicked upon the same siding. A collision occurred and the deceased was crushed between the car upon which he was riding and the defective car. As in the Conarty case, it was plain that had the coupler and drawbar been present the two cars would have been held so far apart that he would have escaped uninjured. There was no attempt to couple on to the defective car or to handle it in any way.

Under these circumstances Mr. Lang was not one of the persons for whose benefit the Safety Appliance Act was passed. The collision was not the proximate result of the absence of the coupler and drawbar. Their presence was not required so that they might act as bumpers.

It is said that had the car not been defective the work on hand would have been done in a different way. Assuming that this is so, still the collision was not the proximate result of the defect.

The judgments of the Trial Term and of the Appellate Division must be reversed and the complaint dismissed, with costs in all courts.

111 Hiscock, Ch. J., Collin, Hogan and McLaughlin, JJ., concur; Chase and Crane, JJ., dissent.

Judgments reversed, etc.

Remittitur.

STATE OF NEW YORK, *ss:*

Court of Appeals.

Pleas in the Court of Appeals, Held at the Court of Appeals Hall, in the City of Albany, on the 6th Day of January, in the Year of Our Lord One Thousand Nine Hundred and Twenty, Before the Judges of Said Court.

Witness: The Hon. Frank H. Hiscock, Chief Judge, Presiding.
R. M. BARBER, *Clerk.*

Remittitur January 7th, 1920.

ANNA E. LANG, as Admx., etc., Respondent,
against
THE NEW YORK CENTRAL RAILROAD COMPANY, Appellant.

Be it Remembered, that on the 30th day of August, in the year of our Lord one thousand nine hundred and nineteen, The
112 New York Central Railroad Company, the appellant in this cause, came here into the Court of Appeals, by Locke, Bab-

cock, Spratt & Hollister, its attorneys and filed in the said court a notice of appeal and return thereto from the judgment and order of the Appellate Division of the Supreme Court in and for the Fourth Judicial Department.

And Anna E. Lang, as Admrx., etc., the respondent in said cause, afterward appeared in said Court of Appeals by Julius A. Schreiber, her attorney.

Which said notice of appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, the said Court of Appeals having heard this cause argued by Mr. Maurice C. Spratt, of counsel for the appellant, and by Mr. Hamilton Ward, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgments herein be and the same hereby are reversed and complaint dismissed, with costs in all courts.

And it was also further ordered that the record aforesaid, and the proceedings in this court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

Therefore, it is considered that the said Judgments be reversed and complaint dismissed, with costs in all courts as aforesaid.

113 And hereupon, as well the notice of appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York, before the justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court before the justices thereof, etc.

R. M. BARBER,
Clerk of the Court of Appeals
of the State of New York.

Albany, January 7th, 1920.

COURT OF APPEALS, CLERK'S OFFICE, *ss:*

I Hereby Certify that the preceding record contains a correct transcript of the proceedings had in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

R. M. BARBER,
Clerk.

[SEAL.]

114 *Order.*

At a Special Term of the Supreme Court, Held in and for the County of Erie, at the City and County Hall in the City of Buffalo on the 19th Day of January, 1920.

Present:

Hon. Philip A. Laing, Justice Presiding.

Supreme Court, Erie County.

ANNA E. LANG, as Administratrix of the Goods, Chattels and Credits of Oscar C. Lang, Deceased, Plaintiff-Respondent,

vs.

THE NEW YORK CENTRAL RAILROAD COMPANY, Defendant-Appellant.

The above named defendant having appealed to the Court of Appeals of the State of New York from a judgment of the Appellate Division of the Supreme Court, Fourth Department, entered and filed in the office of the Clerk of Erie County on the 8th day of March, 1919, whereby it was adjudged that the judgment of the Supreme Court of Erie County entered in this action on the 12th day of June, 1918, in favor of the plaintiff for $18,670.81 be affirmed, and further adjudged that the plaintiff recover of the defendant the sum of $80.40 costs and the said appeal having
115 been duly submitted before the Court of Appeals and after due deliberation the Court of Appeals having ordered and adjudged that the judgments appealed from be reversed and the complaint dismissed, with costs in all courts, and having further ordered and adjudged that the proceedings therein be remitted to the Supreme Court there to be proceeded upon according to law.

Now, on reading and filing the remittitur from the Court of Appeals herein and upon motion of Locke, Babcock, Spratt & Hollister, attorneys for the defendant-appellant, it is

Ordered, that the said order and judgment of the Court of Appeals be and the same hereby are made the order and judgment of this court.

PHILIP A. LAING,
Justice of the Supreme Court.

Granted Jan. 19, 1920.
G. V. LAUGHLIN,
Sp. Dep. Clerk.

116

Judgment.

Supreme Court, Erie County.

ANNA E. LANG, as Administratrix of the Goods, Chattels and Credits of Oscar C. Lang, Deceased, Plaintiff-Respondent,

vs.

THE NEW YORK CENTRAL RAILROAD COMPANY, Defendant-Appellant.

A judgment in this action in favor of the plaintiff and against the defendant having been rendered in this court on the 12th day of June, 1918, for the sum of $18,070.83 and the defendant having appealed from said judgment to the Appellate Division, Fourth Department, and the said judgment having been affirmed in all things by this court and the judgment of affirmance having been entered thereon on the 8th day of March, 1919, which judgment directed that the plaintiff recover of the defendant the sum of $90.40 costs of said appeal, and the defendant having appealed therefrom and the said Court of Appeals having sent hither its remittitur filed herein the 16th day of January, 1920, by which it appears that the said Court of Appeals has reversed the judgment appealed from and dismissed the complaint, with costs in all courts, and has given judgment accordingly and has remitted the judgment of said

117 Court of Appeals to this court to be enforced according to law, and this court having by an order duly entered herein on the 16th day of January, 1920, ordered that said judgment be made the judgment of this court and the defendant's costs having been duly taxed at the sum of $285.13.

Now, on motion of Locke, Babcock, Spratt & Hollister, attorneys for the defendant herein, it is

Adjudged, that the said order and judgment of the Court of Appeals be and the same hereby are made the order and judgment of this court and that the defendant recover of the plaintiff the sum of $285.31 and have execution therefor.

Judgment signed this 19th day of January, 1920.

EDWARD J. CLARK,
Deputy Clerk.

118 STATE OF NEW YORK,
County of Erie, ss:

I, John H. Meahl, Clerk of the County of Erie, and also Clerk of the Supreme and County Courts for said County, the same being Courts of Record, do hereby certify that I have compared the annexed copy of Remittitur, Order and Judgment on pages 111 to 117 with the original thereof, entered and on file in the office of the Clerk of Erie County, and that the same is a correct transcript therefrom and of the whole of said original.

In witness whereof, I have hereunto set my hand and affixed the seal of said County and Courts at Buffalo, this 17th day of March, 1920.

No. 13091.

[SEAL.]

JOHN H. MEAHL,
Clerk.

118½ [Endorsed:] Filed Erie County Clerk's Office Jan. 19" 1920 at 11:00 A. M.

119 Supreme Court of the United States.

ANNA LANG, as Administratrix of the Goods, Chattels and Credits of Oscar C. Lang, Deceased, Plaintiff in Error,

vs.

THE NEW YORK CENTRAL RAILROAD COMPANY, Defendant in Error.

Whereas, the United States Supreme Court has directed a writ of certiorari, dated the 6th day of May 1920, to the judges of the Supreme Court of the State of New York demanding them to send the record and proceedings in said cause to the said Supreme Court, so that the same court may act thereon and on the application for said writ; and

Whereas, a certified transcript of the record on file in the office of the Clerk of said Supreme Court of the State of New York, was duly filed with the Clerk of the United States Supreme Court at Washington, D. C.

Now, therefore, it is stipulated by and between the counsel for the respective parties hereto that the certified transcript of the record now on file in the office of the Clerk of the United States — may be used as a return to the writ so granted as aforesaid, and the Clerk of the Supreme Court of the State of New York in and for the County of Erie is hereby authorized to return this stipulation in lieu of any further return to said writ.

Dated, Buffalo, N. Y., May 10, 1920.

HAMILTON WARD,
Attorney for Plaintiff in Error.
LOCKE, BABCOCK, SPRATT & HOLLISTER,
Attorneys for Defendant in Error.

120 [Endorsed:] Supreme Court, County of Erie. Anna Lang, as Administrator of the Goods, Chattels and Credits of Oscar C. Lang, Deceased, Plaintiff in Error, vs. The New York Central Railroad Company, Defendant in Error. Copy. Stipulation. Hamilton Ward, Attorney at Law, Rooms 104-109 Erie County Savings Bank Bldg., Buffalo, N. Y., Attorney for Plaintiff in Error. Phone. Bell Seneca 503. Filed Erie County, Clerk's Office, May 20, 1920.

121 To the Honorable, the Supreme Court of the United States, Greeting:

In obedience to the writ of certiorari hereto attached and returned herewith, I hereby certify that the foregoing contains a true copy of the stipulation of counsel in the case therein stated, as appears from the original now on file in this office.

Witness my hand and the seal of the Supreme Court hereto affixed this 20 day of May 1920.

[Seal of Supreme Court, County of Erie, N. Y.]

EDWARD J. CLARK,
Deputy Clerk of Supreme Court, Erie County, N. Y.

122 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of New York, Greeting:

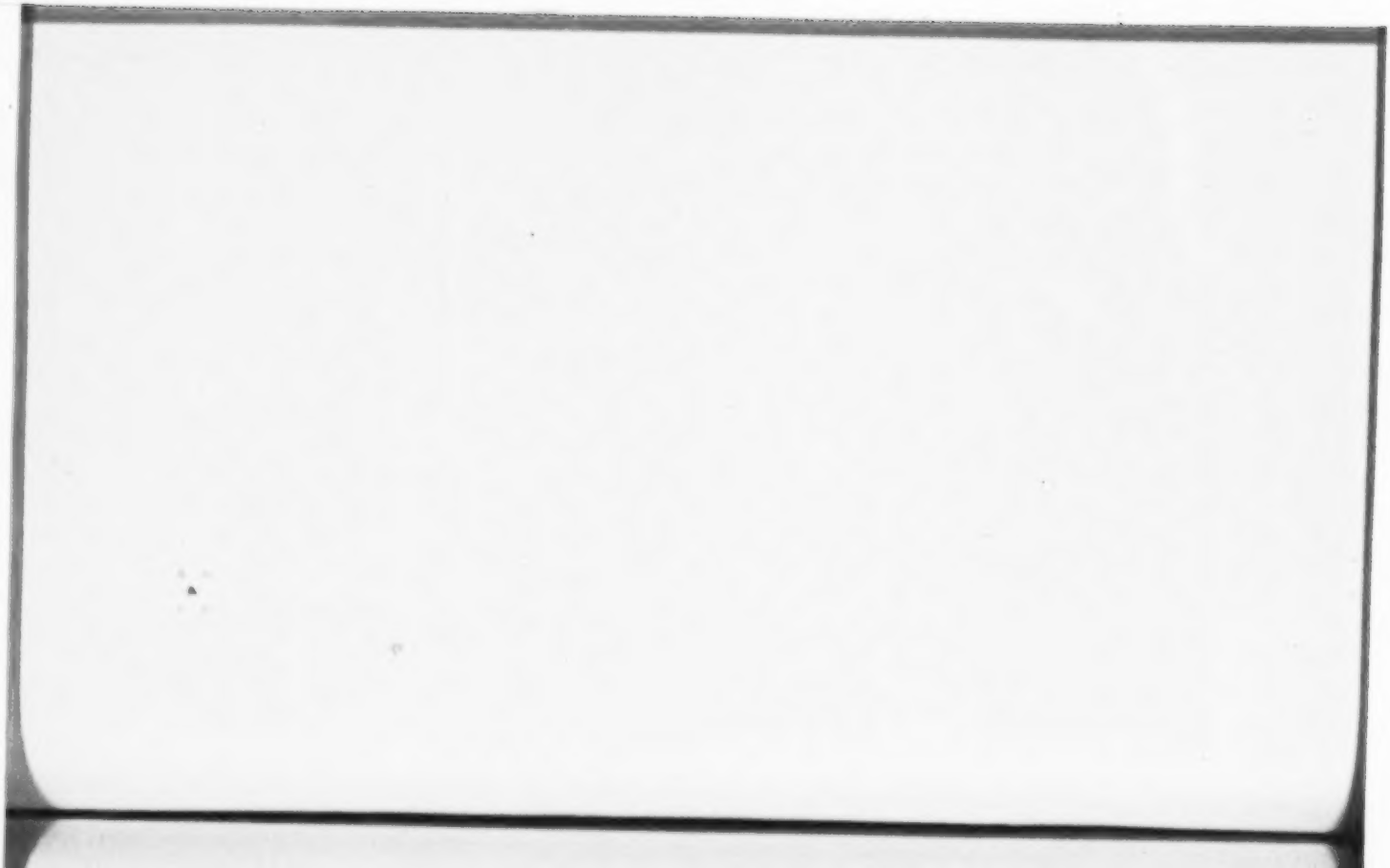
Being informed that there is now pending before you a suit in which Anna E. Lang, as Administratrix of the Goods, Chattels and Credits of Oscar C. Lang, deceased, is plaintiff, and The New York Central Railroad Company is defendant, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Supreme Court and removed into the Supreme Court of the United States, Do hereby
123 command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the sixth day of May, in the year of our Lord one thousand nine hundred and twenty.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

[Endorsed:] File No. 27,572. Supreme Court of the United States, No. 817, October Term, 1919. Anna Lang, as Administratrix, etc., vs. New York Central Railroad Company. Writ of Certiorari.

124 [Endorsed:] File No. 27572. Supreme Court U. S., October Term, 1919. Term No. 817. Anna Lang, as Adm'x, &c., Petitioner, vs. N. Y. Central R. R. Co. Writ of certiorari and return. Filed May 22, 1920.



SUPREME COURT OF THE UNITED STATES

October Term, 1920

ANNA LANG, as Administratrix of the Goods, Chattels, and Credits of OSCAR C. LANG, Deceased,

Petitioner,

versus

NEW YORK CENTRAL RAILROAD COMPANY,

Respondent.

No. 290

Petition on Motion to Advance Case

The petition of Anna Lang respectfully shows as follows:

First: This case comes before this Honorable Court, pursuant to a writ of certiorari granted herein, to review a judgment of the Court of Appeals of the State of New York.

Second: Plaintiff's intestate was employed as a freight trainman on a way-freight train running east from Erie, Pa., to the City of Buffalo, N. Y., and was killed November 1, 1917, by being crushed between two cars, because one of them was defecti-

in that the automatic coupler was broken. Defendant at the time was engaged and intestate employed in interstate commerce when the accident occurred. At Silver Creek there was a car on the siding destined for Farnham which was to be taken from said siding into the train at Silver Creek and thence to its destination. On the siding at Silver Creek was another box car loaded with steel. It was standing with several other cars on the siding next to the car about to be taken on to the train and moved to Farnham. This car was partially unloaded. The consignee had been unable to complete the unloading of the car and it was on said siding while the unloading was proceeding. The draw bar, draft timber and coupling apparatus on the west end of the car as it stood at the time of the accident were gone. The car for Farnham was on what is known as the house track siding and the defective car stood east of it. The train came into the station and stopped on No. 1 track. Owing to the fact that the coupler on the out of order car was broken down on the westerly end, the Farnham car could not be pulled out in the usual way by backing the engine on to the siding from the east and pulling out the cars, including the out of order car and the Farnham car next west, so it was determined to detach the engine and move it by another siding to the westerly end of the switch from which the Farnham and out of order car stood and pull the Farnham car therefrom to the west and attach it to the train. In order to do this it was necessary to pull

out five other cars which stood next to and west of the Farnham car on the same siding. Of these six the Farnham car was put on the train, two left on another siding and the remaining three were connected back on to the siding from which they were taken next to the out of order car. When they were connected back, intestate climbed upon the end of the car fartherest in to operate the brakes which was the usual and proper thing to do. With proper equipment in the way of coupling, the car upon which intestate was working would not have come in close contact with the out of order car as there would have been a space of about two feet, but with the couplers off the contact was complete. It was the duty of intestate to so operate the brakes, if he could, to stop the three cars right next to the out of order car. In operating the brakes intestate was compelled to stand upon the steps at the end, and somewhat below the top of the car. For some reason, presumably because he was unable to stop the three cars in time with the brakes, there was a complete and violent contact and the leg of intestate was crushed which resulted in his death.

Third: In view of the fact that there is a conflict between the law as expounded by the Court of Appeals, the United States Circuit Court of Appeals, and the United States Supreme Court, and because there is manifest confusion as to the interpretation of the Conarty, Layton and Gotschall cases, and that similar cases are constantly arising, not only in the

Federal court but also in the State courts, it is respectfully submitted that an early decision should be made in the case at bar and the law settled as soon as possible in the interest of railroad employers and employees, and for the guidance of the lower courts.

Fourth: The attorneys for the respondent join in this petition.

WHEREFORE, your petitioner respectfully prays that this Honorable Court will grant her motion to advance this case on the calendar of this Honorable Court because of the general importance and public interest in the question involved, and that, if possible, the case be advanced upon the calendar of this court.

Dated Nov. 17., 1920.

JULIUS A. SCHRIEBER,
Attorney for Petitioner,
Office and P.O. Address,
104 Erie County Bank Bldg.,
Buffalo, N. Y.

HAMILTON WARD,
Of Counsel.

Supreme Court of the United States

OCTOBER TERM, 1920.

No. ~~917~~ 990

ANNA LANG, as Administratrix of the Goods, Chattels and Credits of GEORGE H. LANG, Deceased,
Petitioner,
vs.
NEW YORK CENTRAL RAILROAD COMPANY,
Respondent.

PETITION AND MOTION, WITH NOTICE, FOR WRIT OF CERTIORARI TO THE Supreme COURT [redacted] OF THE STATE OF NEW YORK and BRIEF IN SUPPORT THEREOF.

Hamilton Ward,
Attorney for Petitioner.

SUPREME COURT OF THE
UNITED STATES.
TERM, 1920.

ANNA LANG, as Administratrix of the Goods, Chattels and Credits of OSCAR G. LANG, Deceased,
PETITIONER,
vs.
NEW YORK CENTRAL RAILROAD COMPANY,
RESPONDENT.

THE NEW YORK CENTRAL RAILROAD COMPANY, respondent, is hereby notified that Anna G. Lang, as administratrix, etc., petitioner, will on the 15 day of April, 1920, upon her petition and the entire record in the case, upon the opening of court on that day, or as soon thereafter as counsel can be heard, submit a motion, a copy of which and of the petition for writ of certiorari and brief in support thereof, is herewith delivered to you, to the Supreme Court of the United States in its Court Room at the Capitol in the City of Washington, D. C.

HAMILTON WARD,
Attorney for Petitioner.

SUPREME COURT OF THE
UNITED STATES.
TERM, 1920.

ANNA LANG, as Administratrix of the Goods, Chattels and Credits of OSCAR G. LANG, Deceased,
PETITIONER,
against
NEW YORK CENTRAL RAILROAD COMPANY,
RESPONDENT.

Now comes Anna Lang as Administratrix of the goods, chattels and credits of Oscar G. Lang, deceased, by Hamilton Ward her counsel, and moves this Honorable Court that it shall upon certiorari, or other proper process directed to the Honorable Justices of the Court of Appeals of the State of New York, require said court to certify to this court for its review and determination a certain cause in said Court of Appeals, lately pending wherein the petitioner, Anna Lang was plaintiff-respondent and New York Central Railroad Company was defendant-appellant, and to that end tenders herewith her petition and brief and a certified copy of the entire record in such cause in said Court of Appeals.

The court will enter my appearance as counsel for the petitioner.

HAMILTON WARD,
Counsel for the Petitioner,
Office and P. O. Address,
104-09 Erie Co. Bk. Bldg.,
Buffalo, N. Y.

SUPREME COURT OF THE
UNITED STATES.
TERM, 1920.

ANNA LANG, as Administratrix of the Goods, Chattels and Credits of OSCAR G. LANG, Deceased,
PETITIONER,

against

NEW YORK CENTRAL RAILROAD COMPANY,
RESPONDENT.

To the Honorable Supreme Court of the United States:

The petition of Anna Lang as Administratrix of the goods, chattels and credits of Oscar G. Lang, deceased, respectfully shows to this Honorable Court:

That this action was brought by Anna Lang as Administratrix of Oscar G. Lang, deceased, to recover damages against the defendant New York Central Railroad Company for causing the death of said Oscar G. Lang while in its employ.

This action was brought in the Supreme Court of the State of New York under the Federal Employers' Liability Act and the Federal Safety Appliance Act.

The trial resulted in a verdict of Eighteen thousand ($18,000) dollars and judgment was entered

in the Erie County Clerk's office in the State of New York for the sum of Eighteen thousand seventy dollars and eighty-three cents ($18,070.83) on the 13th day of June, 1918.

An appeal was taken from this judgment to the Appellate Division, Fourth Department, which court on March 5, 1918 affirmed the judgment of the lower court, Foote, J., dissenting.

From this judgment an appeal was then taken to the Court of Appeals which court on January 7, 1920, reversed the judgments of the Trial Court and Appellate Division and dismissed the complaint with costs on all ccunts.

Hiscock, C. J., Collin, Hogan and McLaughlin, J. J., concurred with Andrews who wrote opinion. Chase and Crane, J. J., dissenting.

The questions and propositions of law involved in this case are as follows:

I. The rule laid down by the Court of Appeals in the Lang case makes the test of liability whether or not the collision was proximately caused by a violation of the Safety Appliance Act, whereas, the true test, as laid down by the United States Supreme Court is whether or not the *injury* was proximately caused by a violation of the Safety Appliance Act.

II. The Court of Appeals erred in considering the collision as the test of liability, inasmuch as

the collision would have been the ordinary coupling contact, and harmless, but which became dangerous to life and limb because of the absence of the coupler and the violation of the Safety Appliance Act.

III. The Court of Appeals was in error in dismissing plaintiff's complaint, but should have directed a new trial.

At the close of the trial defendant's counsel moved for a direction of a verdict, but the Trial Court held that absolute liability had been established as a matter of law and the only question submitted to the jury was that of damages.

It is claimed by plaintiff that this action, having been brought under both the Employers' Liability Act and the Safety Appliance Act, even if no liability had been established under the Safety Appliance Act, then it was the duty of the Court of Appeals to direct a new trial in order that the plaintiff might have an opportunity to prove a cause of action under the Employers' Liability Act.

IV. A new trial ought to have been granted by the Court of Appeals in any event, as the question of proximate cause of the injury was one of fact for the jury.

V. Your petitioner further alleges that the present case is one in which it is proper for this

court to issue a writ of certiorari for the following reasons:

1. Because there is a conflict in this respect between the law as expounded by said Court of Appeals and the United States Supreme Court.

2. Because there is manifest confusion as to the interpretation of the Conarty, Layton and Gotschall cases. The Trial Court, four of the five Appellate Division judges and two of the Court of Appeals judges have held that this case comes within the rule laid down in the Layton and Gotschall cases. While one Appellate Division Judge and five Court of Appeals judges have held that it is governed by the rule laid down in the Conarty case, and said question is of sufficient general, national and material importance and interest as to make it necessary that it should be determined by the court of last resort.

3. Because the public interest requires the decision of this court upon the questions of law involved herein.

The highest court in the State of New York has seriously limited the application of the Safety Appliance Act which the Supreme Court of the United States has held time and time again imposed an absolute duty of liability. The fact that the Court of Appeals has written an opinion, which in due course will appear in the reports, will greatly tend to unsettle and confuse the law

which this court has settled in the Layton case, and will be productive of endless controversies and litigations whenever the Safety Appliance Act is sought to be invoked.

Your petitioner further shows that a final judgment has been rendered in this action by the highest Court of the State of New York in which a decision in this cause could be had, which judgment became final on the 7th day of January, 1920.

Your petitioner presents to this court as an exhibit to this petition a certified copy of the entire transcript of the record of this case, also a brief of her argument upon the questions of law involved.

WHEREFORE your petitioner respectfully prays that a writ of certiorari may issue out of and under the seal of this court directed to the Court of Appeals of the State of New York, which has the custody of the record in this case commanding said court to certify and send to this court upon a day certain to be therein designated, a full transcript of the record of all the proceedings of the said Court of Appeals, in this case, entitled: "Anna Lang, as Administratrix of the goods, chattels and credits of Oscar G. Lang, deceased, against New York Central Railroad Company" to the end that said cause may be reviewed and determined by this court as required by law

and that your petitioner may have such other and further remedy in the premises as to this court may seem appropriate and that the judgment of said Court ~~of Appeals~~ may be reversed by this Honorable Court.

ANNA LANG, as Administratrix, etc.,
By HAMILTON WARD,
Her Attorney.

SUPREME COURT OF THE
UNITED STATES.

ANNA LANG, as Administratrix of the Goods, Chattels and Credits of OSCAR C. LANG, Deceased,
PETITIONER,
vs.
NEW YORK CENTRAL RAILROAD COMPANY,
RESPONDENT.

BRIEF FOR PETITIONER.

STATEMENT.

Application for Writ of Certiorari to the Supreme Court of [redacted] State of New York, to review a judgment of that Court entered in Erie County Clerk's Office on the 19th day of January 1920, reversing the judgments of the Trial Court for the sum of $18070.83, entered in the Erie County Clerk's office on the 13th day of June 1918, and of the Appellate Division of the Supreme Court, Fourth Department, affirming said judgment and for $30.40 costs, entered in the Erie County Clerk's office on the 8th day of March 1919.

The opinion of Hon. Charles B. Wheeler, Justice, Supreme Court, denying defendant's motion for a new trial is printed at page 92 of the record.

No opinion was written by the Appellate Division, C. J. Kruse, J. J. Lambert, D'Angelas and Foote read for affirmance; Foote, J., dissenting.

The opinion of the Court of Appeals written by Hon. William S. Andrews and concurred in by Hiscock, C. J. Collin, Hogan, McLaughlin, J. J. is printed at page 308 of the record.

From the opinion Crane and Chase J. J. dissented.

FACTS.

The facts are not in dispute. Plaintiff's intestate was employed as a trainman on a wayfreight train running east from Erie in the State of Pennsylvania to the City of Buffalo in the State of New York, and was killed Nov. 1, 1917, (Fol. 92) by being crushed between two cars because one of them was defective in that the automatic coupler was broken. Concededly defendant was engaged and intestate employed in interstate commerce at the time of the accident. At Silver Creek, an intermediate station, there was a car on a siding destined for Farnham, the next station east, which was to be taken from the siding in to the train at Silver Creek and carried on to its destination. On the siding at Silver Creek was another car, a box car which had arrived there two weeks before loaded with steel, consigned to the Hunter Manufacturing Company at Silver Creek. It was standing with several other cars on the siding, next to the car about to be taken onto the train and moved on to Farnham. This car was then partially unloaded. It was in good condition

when it reached its destination at Silver Creek and had been moved about on the siding while in the process of being unloaded, and also in moving other cars about and taking them on and off trains as they passed, and became out of order in thus being shifted about (Fols. 100, 107). In fact the same crew operating the train in question, together with intestate, had had occasion to move this car in carrying on the business of the defendant in taking cars on and leaving them off of trains at Silver Creek. The consignees had been unable to complete the unloading of the car, and it was on the siding while the unloading was proceeding. (Fols. 122, 123).

The draw bar, draft timber and the coupling apparatus on the westerly end of the car as it stood at the time of the accident were gone. This out of order condition was well known to defendant as well as to the crew of the wayfreight, including intestate, and had been the subject of comment by the crew. The car for Farnham was on what is known as the house track siding, and the defective car stood next east of it.

The train came into the station and stopped on Number 1 track. The natural and usual way of getting the Farnham car would have been for the engine to back on to the siding from the east and pull out the cars, including the out of order car and the Farnham car next west, but owing to the fact that the coupler of the out of order car was

broken down on the westerly end, the Farnham car could not be pulled out that way. So it was determined to detach the engine and move it by another siding to the westerly end of the switch upon which the Farnham and out of order car stood and pull the Farnham car therefrom to the west, and then by the necessary process of kicking and side-tracking (Fols. 132, 133) attach it to the train. In order to do this it was necessary to pull out five other cars which stood next to the west of the Farnham car on the same siding. Then of these six the Farnham car was put on the train, two left on another siding, and the remaining three were kicked back on to the siding from which they were taken, next to the out of order car. It was the customary and proper way, when thus leaving cars upon the siding, to couple them up, and except for the defective coupler these three would have been coupled to the defective car. This could not be done, however, because the coupler was gone. So when they were kicked back intestate climbed upon the end of the car farthest in to operate the brakes. This was the usual and proper thing to do. With proper equipment in the way of coupling, it would have been impossible for the car intestate was working on to come in close contact with the out of order car. There would have been a space of about two feet. But with the coupler off, the contact was complete. It was the duty of intestate to so operate the brakes, if he could, as to stop the three cars right next to the out of order car. In operating

the brakes intestate was compelled to stand upon a step at the end and somewhat below the top of the car. For some reason, presumably because he was unable to stop the three cars in time with the brakes, there was a complete and violent contact so that the leg of intestate was crushed, which resulted in his death.

More specific reference will be made to the evidence in discussing the following points:

POINT I.

The Court of Appeals of the State of New York has limited the benefits of the Safety Appliance Act to employees engaged in coupling or uncoupling, or handling cars. It has held there was no liability in a case where the total absence of a coupler on a car engaged in interstate commerce was the proximate cause of an injury. In this the court has disregarded the limitations which the Supreme Court has placed upon the decision in the Conarty case by the decisions in the Layton and Gotschall cases and thereby tended to throw the whole judicial construction of the Safety Appliance Act into confusion.

The true test of liability as laid down by the United States Supreme Court is whether or not the INJURY (not the collision) was proximately caused by a violation of the Safety Appliance Act.

The Court of Appeals erred in considering the collision as the test of liability inasmuch as the collision would have been the ordinary coupling contact, and harmless; but which became dangerous to life because of the absence of the coupler and the violation of the Safety Appliance Act.

This court said in the Layton case: 243 U. S. 617.

> "While it is, undoubtedly, true that the immediate occasion for passing the law requiring automatic couplers was the great number of deaths and injuries caused to employees who were obliged to go between cars to couple and uncouple them, yet these laws as written are by no means confined in their terms to the protection of employees only when so engaged. The language of the Acts, and the authorities we have cited, make it entirely clear that the liability in damages to employees for failure to comply with the law *springs from its being made unlawful to use cars not equipped as required—not from the position the employee may be in, or the work which he may be doing at the moment when he is injured.* This effect can be given to the acts, and their wise and humane purpose can be accomplished only by holding, as we do, *that carriers are liable to employees in damages whenever the failure to obey these Safety Appliance Laws is the proxi-*

mate cause of injury to them when engaged in the discharge of duty."

Judge Andrews says in the Lang case:

> "The Supreme Court said that Section 2 of the Act was intended to provide against the risk of coupling and uncoupling and to obviate the necessity of men going between the ends of the cars. *It was not intended to provide a place of safety between colliding cars.* Therefore, when a collision was not the proximate result of the violation of these regulations, where there was no endeavor to couple or uncouple a car or to handle it in any way, there can be no recovery under the act. The absence of a coupler and drawbar was not a breach of duty toward a servant in that situation."

It would seem that the words quoted "not intended to provide a place of safety between colliding cars" is a decided limitation on the broad purpose which the United States Supreme Court attributes to the acts in the Layton case.

Judge Andrews further says:

> "It was plain that had the coupler and draw-bar been present, the two cars would have been held so far apart that he would have escaped uninjured,"

or, in other words, that the defective coupler was a proximate cause of the injury.

The plaintiff's intestate was engaged in the discharge of his duty at the time. This duty involved the moving of cars, and the very movement in which he was engaged, and which resulted in his death, was on account of the defective coupler (Fols. 76, 142). The car with the defective coupler was not withdrawn from business but was in use at the time of the accident and had been for several days previous thereto (Fols. 112-13-20-23; 142-3).

The Court of Appeals makes the test of liability the proximate cause of the *collision*. This, we respectfully submit, is not the test. The cause of action arises out of the *injury* and not out of the *collision*. The true test is whether or not the the defective coupler was the proximate cause of the *injury*. The statute, which provides,

> "It shall be unlawful for any such common carrier to haul, or permit to be hauled, or used, on its line any car used for moving interstate traffic not equipped with couplers coupling automatically by impact, etc."

has been violated. That this violation was a proximate cause of the *injury* has been held as a matter of law in this case. Any other test, viz., whether the violation of the statute was the proximate cause of the car movements or the plaintiff's movements, does not meet the test laid down in the Layton case, viz.:

> "Carriers are liable to employees in damages whenever the failure to obey these Safe-

ty Appliance laws is the proximate cause of injury to them when engaged in the discharge of duty."

But, even if we adopt the views of the Court of Appeals that the test of the applicability of the Safety Appliance Act is to be determined by whether or not the defective coupler was the proximate cause of the collision, of course, there were several collisions involved in the movement. The first occurred when the engine kicked the car in which the plaintiff's intestate was riding in on the side track. This was harmless. Had the coupler been in place there would have been a second harmless collision between the couplers of the two cars. The absence of the coupler permitted a different sort of collision, viz., a collision between the ends of the cars that were not intended to come together, and which resulted in the injury.

This is the only collision that the action revolves itself around, and certainly this collision was caused by the absence of the coupler. But, be this as it may, we respectfully submit that where a violation of the Safety Appliance Act is established, and that violation is a proximate cause of an *injury* to an employee in the discharge of his duty, liability is established. If the Court of Appeals had the right to construe the statute in the light of the Conarty case alone, where the Supreme Court said:

> "The risk in coupling and uncoupling was the evil sought to be remedied,"

and again,

> "Nothing in either provision gives any warrant for saying that they are intended to provide a place of safety between colliding cars. On the contrary, they affirmatively show that the principal purpose in their enactment was to obviate the necessity of men going between the ends of the cars,"

then it might be held that as the deceased was not coupling or uncoupling, or going between the cars for that purpose, the Act was not applicable. But the Supreme Court, evidently anticipating that such a narrow construction might be put on the Conarty case, has expressly determined in the Layton case that the responsibility is not determined

> "from the position the employee may be in or the work which he may be doing at the moment when he is injured,"

and, unfortunately, that seems to be the test applied to the deceased by the Court of Appeals, and when the court says that couplers were not required so that they might act as bumpers, it indicates an indisposition to apply the simple rule of the Layton case, viz., was there a violation, and was such violation the proximate cause of the injury?

Should it be necessary to further distinguish this case from the Conarty case, attention is respectfully invited to the following:

In the Conarty case, Judge VanDeventer has pointed out, first:

> "The deceased and his co-employees with the switch engine were on their way to do some switching at a point some distance beyond the car, and were not intending and did not intend to couple it to the engine or handle it in any way. This movement was in the hands of others."

In the case at bar the very movement in which the plaintiff's intestate met his death was required by reason of his inability to handle the defective car in the usual way because of the defect.

Again, Judge VanDeventer says:

> "We are of the opinion that the deceased, who was not endeavoring to couple or uncouple the car, or handle it in any way, but was riding on the colliding engine, was not in a situation where the absence of the prescribed coupler and draw-bar operated as a breach of duty imposed for his benefit."

But, as was pointed out, the deceased here was charged with the duty of placing the car on which he was riding as close to the defective car as possible (Fols. 76, 142) and was making the movement in a different manner than usual because of the defective car, and at the very time of the accident was required to be at a point of danger to prevent a collision with the defective car, which would be

damaging to property because of the defect and which would have been harmless without it. (Fols. 181-188-189).

Since the Supreme Court has written in the *Layton* and *Gotschall* cases, employees who are not engaged in coupling or uncoupling, or handling defective cars in any way are under the protection of the Act.

Plaintiff has the benefit of both the Safety Appliance and Federal Employers' Liability Acts. (San Antonio &c. R. Co. v. Wagner, 241 U. S., 476. 36 S. C. R., 626).

It is well settled that if the defective coupling contributed in *whole or in part* to the death of intestate, that is sufficient to establish absolute liability under the Safety Appliance Act, and neither contributory negligence nor assumption of risks can avail defendant as a defense, or in diminishing the damages.

Union Pacific R. R. Co. vs. Huxoll, (245 *U. S.,* 535; 38 *S. C. R.,* 187).

As said in the *Wagner case,* (241 *U. S.,* 476; 36 *S. C. R.,* 626):

> "If this Act is violated, the question of negligence in the general sense, or want of care, is immaterial."

And in the

Parker case, (242 *U. S.,* 56; 37 *S. C. R.,* 69):

"If there was evidence that the railroad failed to furnish such couplers, coupling automatically by impact, as the statute requires, nothing else need be considered."

See also

Layton case, 243 *U. S.*, 617; (37 *S. C. R.*, 456).

Otos case, 239 *U. S.*, 349; (36 *S. C. R.*, 124).

Rigsby case, 241 *U. S.*, 33; (33 *S. C. R.*, 482).

Delk v. St. Louis S. F. R. Co., 220 *U. S.*, 580; (31 *S. C. R.*, 617).

In

Spokane, etc., vs. Campbell, (217 *Fed.*, 524).

the Court said, in speaking of the Act:

"The effect of this statute is to eliminate the element of proximate cause where the concurrent acts of the employer and employee contribute as a cause for the injury or death of the employee, especially where the contributing act of the employer was in derogation of a duty imposed under the Act for the safety of the employee."

This is judicially declared in

Grand Trunk Western Ry. Co. v. Lindsay, (233 *U. S.*, 42; 34 *S. C. R.*, 581).

If, therefore, violation of this Act was a concurring cause, that ends the case so far as defendant's liability is concerned, and no negligence on

the part of intestate. (Section 3, Federal Employers' Liability Act; Great Northern Ry. Co. v. Otos, 239 U. S., 349; 36 U. S., Sup. Ct. Rep., Grand Trunk & Western R. Co. v. Lindsay, 233 U. S., 42, 34 S. C. R, 581; Delk v. St. L. S. F. R. Co., 220 U. S., 580, 31 Sup. Ct. Rep., 617), or assumption of any risk on his part, (Section 4, Employers' Liability Act; Section 8, Safety Appliance Act; Texas & Pacific Ry. Co. v. Rigsby, 241 U. S., 33; 36 Sup. Ct. Rep., 480, Schlemmer v. B. R. & B. Ry. Co., 220 U. S., 590, 31 S. C. R., 561), or any negligence on the part of defendant, or any employee of defendant (Texas & Pacific Ry. Co. v. Rigsby, *supra;* Delk v. Ry. Co., *supra;* C. B. & Q. R. Co. v. U. S., 220 U. S., 559; 31 Sup. Ct. Rep., 612; St. L. S. T. L. I. M. & S. R. Co. v. Taylor, 210 U. S., 281, 28 S. C. R., 616, can in any way avert or affect the liability of defendant or the amount of damages. If the act governs the case, the liability, by force of it, is absolute.

There is no contention here, but that the breaking down of the coupler on the out of order car in question was at least a concurring cause of intestate's death. It is undisputed that if the statutory coupler had been on this car in working order, the car upon which intestate was engaged in operating the brakes, would, when it was kicked against it have coupled automatically and been held apart for a distance of at least two feet by the automatic coupler, which would have prevented the accident, but that the absence of the automatic coupler permitted a complete contact, thus

crushing intestate's leg and causing his death. (Fols. 135, 162-165, 167-169, 171).

These actions for violations of the Safety Appliance Act are generally brought in the State Courts. Many such actions are brought in the State of New York. This State is within the Second Judicial Circuit.

It is respectfully submitted that the decision in the Lang case is not only in flat contradiction of the principles laid down in the Layton case and the Gotschall case, but is specifically in conflict with the case of

Erie v. Russell, 183 Fed. Reporter, 724 (Second Circuit).

In this case plaintiff was repairing a defective coupler. One of the other cars were pushed into the car having the defective coupler, which resulted in injury to the plaintiff. The plaintiff was not engaged in coupling, or uncoupling, or in handling the car in any way, except that he was repairing the defective coupler. The court said:

> "The second question of importance in the case is whether the Trial Court properly submitted to the jury the question whether the presence of the defective coupler was a proximate cause of the accident. It is urged with much force that that which caused the injury to the plaintiff's intestate was the unexpected movement of the three cars—an act unrelated to, and independent of, the act of re-

pairing the coupler. Indeed, were the question to be decided free of authority, a majority of the court would have difficulty in holding that the repair of the coupler was a part of a coupling operation, and bore such a relation to the impact of the cars that the necessity for such repairs was an efficient cause of the accident. But still the reason why Russell went to the place where he was injured was the defective coupler, and if he had not gone there the accident would not have occurred."

In the Sixth Circuit in the case of

Erie R. Co. v. Schleenbaker, 257 Fed., 667, the court has gone even further. The defective car was placed at the back end of a train, and because of this the lights were removed from the caboose to the rear end of the defective car. The removal of these lights caused the conductor of the train to lose his footing and receive the injuries complained of. The court affirmed a judgment for the plaintiff which determined that the defective coupler was the proximate cause of the conditions which followed.

It would, therefore, appear that if a plaintiff brings an action in the Federal Court in the State of New York, the rule of the Russell case will apply. If he brings the action in the State Court, the rule of the Lang case will apply. It is unseemly that there should be a different construction of a Federal statute by the State and Federal

Courts in the same jurisdiction which construction leads to precisely opposite results in the adjustment of the rights of the parties.

POINT II.

The Court of Appeals was in error in dismissing plaintiff's complaint but should have directed a new trial.

This action having been brought under both the Employers' Liability Act and the Safety Appliance Act, it was error for the Court of Appeals to dismiss plaintiff's complaint but a new trial ought to have been granted in order that plaintiff might have an opportunity to prove her cause of action under the Employers' Liability Act.

Furthermore the Court of Appeals erred in dismissing plaintiff's complaint for the further reason that the question of proximate cause was one for the jury to determine and a new trial ought to have been granted instead.

Erie R. R. Co. v. Russell, 183 Fed., 722.
Donegan v. Baltimore & N. Y. R. Co., 165 Fed., 869.

POINT III.

It is respectfully submitted that the petition for writ of certiorari should be granted.

HAMILTON WARD,
Counsel for Petitioner.

Supreme Court of the United States

OCTOBER TERM, 1920

No. 290

ANNA LANG, as Administratrix of the Goods, Chattels and Credits of OSCAR C. LANG, Deceased, *Plaintiff-in-error*,

versus

NEW YORK CENTRAL RAILROAD COMPANY, *Defendant-in-error.*

BRIEF FOR PLAINTIFF-IN-ERROR

JULIUS A. SCHRIEBER,
Attorney for Plaintiff-in-error,

Office and P.O. Address,
104 Erie County Bank Bldg.,
Buffalo, N. Y.

HAMILTON WARD
and
IRVING W. COLE,
Of Counsel.

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TABLE OF CASES

SUPREME COURT OF THE UNITED STATES

October Term, 1920

ANNA LANG, as Administratrix of the Goods, Chattels, and Credits of OSCAR C. LANG, Deceased,

Plaintiff-in-error,

versus

NEW YORK CENTRAL RAILROAD COMPANY,

Defendant-in-error.

Brief for Plaintiff-in-Error

STATEMENT.

Writ of certiorari to the Supreme Court of the State of New York (fols. 121-124) to review a judgment of the Court of Appeals, the highest court of said state, made the judgment of said Supreme Court (fols. 114-118, entered on the 19th day of January, 1920 (fols. 116-118), reversing a judgment of the Appellate Division of said Supreme Court (fols. 101-103) which affirmed a judgment of the trial term of said court (fols. 14-10) and an order of the trial court denying defendant's motion for a new trial on the minutes (fols. 16, 17), entered on a verdict of a jury in favor of plaintiff-

in-error, plaintiff at the trial, against defendant-in-error, defendant at the trial, for the sum of $18,000.00, apportioned as follows:

To Anna E. Lang, widow of intestate....$7000.00
To Raymond J. Lang, son of intestate.... 2500.00
To Dorothy M. Lang, daughter of inestate 4000.00
To John A. Lang, son of intestate..... 4500.00
(fols. 19, 20, 90).

The opinion of Hon. Charles B. Wheeler, the judge before whom, with a jury, the case was tried, denying defendant's motion for a new trial on the minutes is printed at pages 64-68 of the record.

No opinion was handed down on the affirmance of said judgment and order by said Appellate Division.

The opinion of the Court of Appeals of the State of New York by Andrews, J., upon reversal of said judgment and dismissal of the complaint is printed on pages 72, 73 of the record.

PLEADINGS

COMPLAINT.

It appears by the complaint that the defendant, the New York Central Railroad Company, is a domestic railroad corporation and was, during the times mentioned in said complaint, engaged in the

business of operating a steam service railroad in and through various states, including New York, Pennsylvania and Ohio, and was engaged in interstate commerce (fol. 5). That on November 1, 1917, Oscar G. Lang, plaintiff's intestate, was engaged in his work, as employee of defendant at Silver Creek, New York (fol. 5), in interstate commerce and was killed by reason of the violation by said defendant of the Federal Safety Appliance Act. fols. 6-8).

ANSWER

The answer of defendant admits the corporate existence and status of defendant and that it was at the times mentioned engaged in interstate commerce (fols. 9,5). Then denies knowledge or information sufficient to form a belief as to the other allegations of the complaint excepting that it admits on November 1st, 1917, said Oscar C. Lang was in the employ of defendant as a freight brakeman and met with an accident at Silver Creek, New York, sustaining injuries from which he died, and also that both he and the defendant were, at the time, engaged in interstate commerce (fol. 9).

Then said answer alleges that said injuries occurred by reason of the negligence of said intestate and that said intestate assumed the risk (fols. 9, 10).

Trial and Subsequent Proceedings

The action was brought to trial before Hon. Charles B. Wheeler, Justice of the Supreme Court of the State of New York, and a jury in Erie County, New York, on June 6, 1918 (fol. 21), resulting in the verdict aforementioned (fols. 19, 20, 90).

Under the state practice a motion was then made to the trial court on the minutes by defendant for a new trial which was denied (fols. 16, 17), and the judgment on said verdict was duly entered June 13, 1918 (fols. 14, 15).

From this judgment and order defendant appealed to said Appellate Division (fols. 2, 3), which on March 5, 1919, affirmed said order and judgment (fols. 100-103).

From this judgment defendant appealed to said Court of Appeals by which the judgments of the courts below were reversed and the complaint of plaintiff dismissed, finally determining and ending the action, except for the right of review in this court, two of the judges of said court dissenting (fols. 111-113).

Under the state practice the rimittitur containing the order for such reversal was sent down to the Supreme Court, which, by order, made the judgment of said Court of Appeals the judgment of the Supreme Court of said state (fols. 114,115). A judgment to that effect was entered (fols. 116, 117).

Plaintiff then made due application to this court for a writ of certiorari to review said final judgment, which writ was granted by this court at the October, 1918, term, and filed May 22nd, 1920 (fols. 121-124).

FACTS

The facts are not in dispute.

It is conceded that defendant and intestate were both engaged in interstate commerce at the time of the accident resulting in the intestate's death (fol. 9).

Intestate was at the time, November 1, 1917, acting as a brakeman on a way freight train running east from Erie in the state of Pennsylvania to the city of Buffalo in the state of New York, and was killed by being crushed between two cars because one of them was defective in that the automatic coupler was broken (fol. 31).

At Silver Creek, an intermediate station, there was a car standing on the siding destined for Farnham, the next station east, which was to be taken from the siding and attached to said train at Silver Creek and carried to Farnham, its destination. Standing with it on the siding at Silver Creek was a box car which had arrived there two weeks before loaded with steel consigned to the Hunter Manufacturing Company of Silver Creek. It was then

in process of being unloaded but not yet completely unloaded. It was in good condition when it reached its destination at Silver Creek two weeks before and had been moved about on the sidings there while in the process of being unloaded and also for the purpose of moving cars on and off the siding and taking them on and off trains as they passed that station, and some time during said two weeks, and previous to the time of the accident, it became out of order in thus being shifted about, the automatic coupler thereon being broken and defective (fols. 34-37, record).

The defective condition of the car and that such defect constituted a violation of the Safety Appliance Act are not disputed.

Defendant had been unable to complete the unloading, and the car was on the siding and being thus shifted about while the unloading was proceeding (fols. 41, 42).

The crew to which intestate belonged operating the way freight train in getting the car intended for Farnham had to move the defective car and shift it about for that purpose, or else adopt another method of getting it out, which they did, but which was made necessary and controlled by the presence, position and defective condition of the out of order car.

A material and distinguishing fact here is that this defective car, so defective in violation of the

Safety Appliance Act, *was in use by defendant and also by the crew of which intestate was a member.* The unloading of it had not been completed (fols. 38-42), the cargo not yet delivered. It was necessary to shift it about on the siding back and forth whenever a movement such as intestate was engaged in became necessary (fols. 38-42, 48-51).

So, it is seen that *defendant was using this defective car;* that it had not been laid up for repairs, nor was it standing on the track or siding where it stood on the day of the accident because it had been taken out of use or laid up for repairs, but it was still in active use for transportation as a car by defendant, and intestate was required to use it or to perform his work of shifting and moving cars with reference to it, and his work in that respect was affected and controlled by the presence and use by defendant of such defective car. In fact he was in a position to be, and was injured and killed only for that very reason.

The drawbar and draft timber and the coupling apparatus on the westerly end of the car as it stood at the time of the accident were gone. This was well known to defendant.

The train which intestate was, with his crew, operating, came into the station from the west, and stopped on number one track. The Farnham car stood next west of the defective car. The natural and usual way of getting the Farnham car would have been for the engine, then east of the siding, to

back on the siding from the east, after being detached from its train, and pull out both the out of order car and the Farnham car together that way, but owing to the fact that the coupler of the out of order car was broken down on the westerly end next to the Farnham car, the latter could not be pulled out in that way.

So intestate and his crew had to detach the engine from their train and move it, by another siding, around to the westerly end of the switch or siding on which the out of order car and the Farnham car stood, and pull the Farnham car out toward the west and then by the necessary process of kicking and side tracking attach it to the train (fols. 44, 45). In order to do this it was necessary to pull out five other cars which stood next to the west of the Farnham car on the same siding. Then of these six the Farnham car was attached to the way freight train. Two were left on another siding and the remaining three were kicked back onto the siding from which they were taken, in next to the out of order car which had not been moved. It was shown to be the customary and proper way when thus kicking cars in to be left on the siding, to couple them up to any other cars standing there, and this would have been done except for the defective coupler on the out of order car which rendered it impossible. So, when these three cars were kicked back intestate climbed upon the end of the car farthest in which would be moved up next to the out of order car, to operate the brakes. This was

the usual and proper thing to do. With proper equipment in the way of coupling this would have been unnecessary, and it would have been impossible for the car intestate was working on to come in close contact with the out of order car. There would have been a space of about two feet which would have rendered intestate's position perfectly safe. But with the coupler off the defective car, the contact, when the car intestate was riding came up, was complete so that anything between these cars would be crushed. It was the duty, of course, of intestate to operate the brakes, if he could, so as to stop the three cars right next to the out of order car where they were intended to be placed and left, and also so as to prevent a damaging collision between the cars which would, of course, have been serious to the cars themselves in the absence of the ordinary bumper which held them apart. In operating the brakes intestate was compelled to stand upon a step at the end and somewhat below the top of the car. For some reason, presumably because he was unable to stop the three cars in time with the brakes, there was a collision, which collision, however, would not have rendered intestate's position unsafe or inflicted any injuries upon him had the out of order car been equipped with couplers according to statutory requirements, but such statutory couplers being absent, the contact was complete and violent so that the leg of the intestate was crushed resulting in his death.

Further reference will be made to the evidence in discussing the following points:

POINT 1.

THE JUDGMENT ENTERED ON THE DECISION OF THE STATE COURT OF APPEALS REVERSING THE JUDGMENTS OF THE LOWER COURTS AND DISMISSING THE COMPLAINT, SHOULD BE REVERSED AND SET ASIDE AND THE VERDICT AND THE JUDGMENTS OF THE TRIAL COURT AND APPELLATE DIVISION OF THE STATE SUPREME COURT REINSTATED AND AFFIRMED BECAUSE SAID COURT OF APPEALS IS IN ERROR IN HOLDING:

1. That where the *injury* was proximately caused by a violation of the safety appliance act, there could be any other test of liability.

2. That the Federal Safety Appliance Acts were not intended for the protection of intestate in the work he was doing when killed.

3. That the Federal Safety Appliance Act

> "was not intended to provide a place of safety between colliding cars,"

when the work of the employee requires him, at the time, to be between such cars.

Plaintiff has the benefit of both the Safety Appliance and Federal Employers' Liability Acts. (San Antonio & S. R. Co., vs. Wagner, 241 U. S., 476, 36 S. C. R., 626.)

If the defective coupling contributed in *whole or in part* to the death of intestate, that is sufficient to establish absolute liability. Neither contributory negligence nor assumption of risk can avail defendant as a defense:

> Union Pacific R. R. Co. vs. Huxoll (245 U. S., 535; 38 S. C. R., 187).
>
> As said in the *Wagner case* (241 U. S., 476; 36 S. C. R., 626):
>
> "If this Act is violated, the question of negligence in the general sense, or want of care, is immaterial."

And in the

> *Parker case* (242 U. S., 56; 37 S. C. R., 69):
>
> "If there was evidence that the railroad failed to furnish such couplers, coupling automatically by impact, as the statute requires, nothing else need be considered."

See also

> Layton case, 243 U. S., 617 (37 S. C. R., 456).
>
> Otos case, 239 U. S., 349 (33 S. C. R., 124).
>
> Rigsby case, 241 U. S., 33 (33 S. C. R., 482).
>
> Delk vs. St. Louis S. F. R. Co., 220 U. S., 580 (31 S. C. R., 617).

In

> Spokane, etc., vs. Campbell (217 Fed., 524),

the Court said, in speaking of the Act:

> "The effect of this statute is to eliminate the element of proximate cause where the concurrent acts of the employer and the employee contribute as a cause of the injury or death of the employee, especially where the contributing act of the employer was in derogation of a duty imposed under the Act for the safety of the employee."

This is judicially declared in

> Grand Trunk Western Ry. Co. vs. Lindsay, (233 U. S., 42, 34, S. C. R., 581).

If, therefore, violation of this Act was a concurring proximate cause, that ends the case so far as defendant's liability is concerned, and no negligence on the part of intestate. (Section 3, Federal Employers' Liability Act; Great Northern Ry. Co. vs. Otos, 239 U. S., 349, 36 U. S., Sup. St. Rep.; Grand Trunk & Western R. Co. vs. Lindsay, 233 U. S., 42, 34 S. C. R., 581; Delk vs. St. L. S. F. R. Co., 220 U. S., 580, 31 Sup. Ct. Rep., 617), or assumption of any risk on his part, (Section 4, Employers' Liability Act; Section 8, Safety Appliance Act; Texas & Pacific Ry. Co. vs. Rigsby, 241 U. S., 33; 36 Sup. Ct. Rep., 480; Schlemmer vs. B. R. & B. Ry.

Co., 220 U. S., 590, 31 S. C. R., 561), or any negligence on the part of defendant, or any employee of defendant (Texas & Pacific Ry Co. vs. Rigsby, supra; Delk vs. Ry. Co., supra; C. B. & Q. R. Co. vs. U. S., 220 U. S., 559; 31 Sup. Ct. Rep., 612; St. L. S. T. L. I. M. & S. R. Co., vs. Taylor, 210 U. S., 281, 28 S. C. R., 616) can avert or affect the liability of defendant. If the Act governs the case, the liability, by force of it, is absolute.

Errors of State Court of Appeals

There can be no contention here, but that the breaking down of the coupler on the out of order car in question was at least a concurring, proximate cause of intestate's death. It cannot be disputed that if the defective car had not been in use by defendant, intestate would not have been injured; or that if the statutory coupler had been on this car in working order, the car upon which intestate was engaged, with part of his body necessarily between the cars, in operating the brakes, would, when it was kicked against the defective car, have coupled automatically and been held apart for a distance of at least two feet by the automatic coupler, which would have prevented the accident, but that the absence of the automatic coupler caused a complete contact, for that reason, crushing intestate's leg and causing his death (fols. 44, 45, 54-60).

In the Layton case (234 U. S., 617; 37 Sup. Ct. Rep., 456), above referred to, this court said:

> "At the time the plaintiff was injured these Acts (Safety Appliance Acts) made it unlawful for any carrier engaged in interstate commerce to use on its railroad any car not so equipped. By this legislation the qualified duty of the common carrier is expanded into an absolute duty in respect to car couplers, and if the *railroad companies used cars which do not comply with the standard thus prescribed, they have violated the plain prohibition of the law and there arose therewith a liability to make compensation to any employee who was injured because of it.*"

The defective car in the case at bar was not only so defective in violation of the statute (this is not disputed), *but was in use by the defendant* and was required to be used by intestate and he was injured because of it. The State Court failed utterly to give proper significance and effect to these facts which distinguish this case from the Conarty case (238 U. S., 243; 35 S. C. R., 785) relied upon by it. For in that case the out of order car was standing on an isolated switch waiting for repairs; out of commission, and out of use by the defendant. Nor was the injured employee required to use it or move it in any way, or have anything to do with it. The car upon which he was riding simply collided with it

while it was so standing out of use, laid up for repairs. This Court in that case said:

> "The deecased and his companions, with the switch engine, were on their way to do some switching at a point some distance beyond the car and were not intending or did not attempt *to couple the engine or to handle it in any way.* This movement was in the hands of others."

The deceased in that case was not engaged in any duty whatever at the moment of the injury, but simply riding on an engine to a place where he expected to be engaged in switching, which switching work, however, had nothing to do with the out of order car.

The point involved in the case at bar is this: Was the violation by defendant of the Safety Appliance Act in using a defective car with a broken down coupler the proximate cause of intestate's death? The position of defendant before the Court of Appeals was based entirely upon the contention that the *car was not in use by it.* The undisputed fact is otherwise. It appears that this defective car had arrived at Silver Creek, its destination, and where the accident happened, from Beaver Falls, Pennsylvania, on October 16, 1917, two weeks before the accident, loaded with steel (fols. 34-37) consigned to the Hunter Manufacturing Company at Silver Creek (fols. 38-42). It was in good condition when

it arrived (fols. 34-37), but in shifting it about in the yards while in use there, the drawbar had been pulled out and the coupler put out of commission (fols. 34-37). It was during the interval between the time of its arrival at Silver Creek and the accident, and also at the time of the accident, in process of being unloaded, in use in the transportation business of defendant, and, in the meantime, it had to be shifted about from one place to another on the sidings in getting unloaded and in order to permit the ordinary movements incident to the business of defendant which it employed intestate to do, to go on (fols. 38-42, 48-51). It had not been taken out of use or out of commission or laid up for repairs. The defendant was using it without the statutory coupler upon it and in violation of the Safety Appliance Act.

If the defendant had not so violated the Act, intestate would not have been injured. Therefore, it would seem to follow, obviously, that the violation was a proximate cause of the injury.

Intestate Was Within the Protection of the Act

In Louisville & Nashville Ry. Co. vs. Layton (243 U. S., 617; 37 Sup. Ct. Rep. 456), supra, this Court said:

"While it is undoubtedly true that the immediate occasion for passing the law requiring automatic couplers was the great number of deaths and injuries caused to employees who were obliged to go between the cars to couple and uncouple them, yet, these laws, as written, are by no means confined in their terms to the protection of employees only when so engaged. The language of the Acts and the authorities we have cited, make it entirely clear that the liability in damages to employees for failure to comply with the law, *springs from its being made unlawful to use cars not equipped as required—not from the position the employee may be in or the work which he may be doing at the moment when he is injured.* This effect can be given to the Acts, and their wise and humane purpose can be accomplished only by holding, as we do, that carriers are liable to employees in damages whenever the failure to obey these Safety Appliance Laws is the proximate cause of the injury to them when engaged in the discharge of duty."

In that case plaintiff was a switchman in the employ of the railroad company. A train of cars standing on the switch was separated by about two car lengths from five other cars on the same track

loaded with coal. An engine pushing a stock car ahead of it came onto the switch and attempted to couple to said five cars but failed, striking them, however, with such force that although the engine with the stock car attached stopped within a car length, the five loaded cars were driven by the compact over the two intervening car lengths between the five cars and the train standing on the switch, and struck the train so violently that plaintiff who was on one of the five cars for the purpose of releasing the brakes, was thrown to the track and injured. The failure to couple arose from lack of equipment with an automatic coupler of the car being pushed by the engine.

In Minneapolis & St. L. Ry. Co. vs. Gotschall (244 U. S., 66; 37 S. C. R., 598), intestate, a brakeman in the employ of the railroad, boarded a car toward the rear end of the train at a station and was proceeding along the tops of the cars toward the locomotive when the train started because of the opening of a coupler on one of the cars, resulting in an automatic setting of the emergency brakes and a sudden jerk which threw intestate off the train and under the wheels, causing his death. He was not engaged in coupling cars but was simply pursuing his general employment as brakeman, at the moment walking on top of the train.

It would seem, from the above case, that this court had settled the controversy as to whether an employee, in order to come within the Safety Appli-

ance Act, must be engaged at the precise time in going between the cars to couple, or be engaged in coupling at all, and holds that an injury resulting from a defective coupler to any employee in whatever duties he may be engaged, and wherever he may be in the performance of his duties, comes within the Act.

The holding by the State court here that:

> "The Supreme Court said (referring to the Conarty case, 238 U. S. 243), that section two of the Act was intended to provide against the risk of coupling and uncoupling and to obviate the necessity of men going between the ends of the cars. *It was not intended to provide a place of safety between colliding cars.* Therefore, when a collision was not the proximate result of the violation of these regulations where there was no endeavor to couple or uncouple a car or to handle it in any way, there can be no recovery under the Act. *The absence of a coupler and draw-bar was not a breach of duty toward a servant* in that situation," (fol. 109),

is, therefore, unsound.

Intestate, in the case at bar, was engaged in the discharge of his duties as brakeman at the time. This duty involved the moving of cars, coupling and uncoupling them, and the very movement in which

he was engaged and the presence of part of his body between the cars, and which resulted in his death on account of the defective coupler. The car with the defective coupler was not withdrawn from business but was still in use at the time of the accident (fols. 34, 42, 48-51).

The State Court made the test of liability the proximate cause of the *collision*. This is not the test. But rather, was the violation of the Safety Appliance Act the proximate cause of *intestate's death?* As said in the Layton case:

> "Carriers are liable to employees in damages whenever the failure to obey these Safety Appliance Laws is the proximate cause of *injury* to them when engaged in the discharge of duty."

However, it can as well be said that the violation of the Act by defendant was the proximate cause of the so-called collision for there would have been no collision, at least such as occurred, if the statutory coupler had been on in proper condition. It was the absence of the coupler, the violation of the Act, which made possible the collision which killed intestate. The cars might have otherwise bumped against each other but with no harm to intestate because the couplers would have kept the cars apart two feet and intestate's legs would not have been crushed.

But there was no collision in the true sense of the term, merely the usual bumping together in the shifting about of cars. There was a *close contact* when the cars came together which *close* contact resulted in intestate's death, and which occurred because of the violation of the Acts by defendant.

Judge Andrews for the Court of Appeals, said:

> "It was plain that had the coupler and draw-bar been present, the two cars would have been held so far apart that he (intestate) would have escaped injury."

The question as to what caused the cars to bump against each other has nothing to do with the case.

It was: (1) *the unlawful use by defendant of a legally defective car that caused intestate's death*, and (2), immediately and specifically, *the close contact caused by the unlawful defect.*

If the Court of Appeals had the right to construe the statute in the light of the Conarty case alone, where the Supreme Court said:

> "The risk in coupling and uncoupling was the evil sought to be remedied,"

and again:

> "Nothing in either provision gives any warrant for saying that they are intended to provide a place of safety between col-

> liding cars. On the contrary, they affirmatively show that the principal purpose in their enactment was to obviate the necessity of men going between the ends of the cars,"

then, in the narrowest and most illiberal view possible, it might be held that, as the deceased was not coupling or uncoupling or going between the cars for that purpose, the Act was not applicable. But the Supreme Court, evidently anticipating that such a narrow construction might be put on the Conarty case, has since expressly said in the Layton case that the responsibility is not determined

> "from the position the employee may be in or the work which he may be doing at the moment when he is injured."

When the State Court says that couplers were not required so that they might act as bumpers, it indicates an indisposition to apply the simple rule of the Layton case, viz., Was there a violation, and was such violation the proximate cause *of the injury?*

Should it be necessary to further distinguish this case from the Conarty case, attention is respectfully invited to the following:

In the Conarty case, Judge VanDeVenter has pointed out, first:

> "The deceased and his co-employees with the switch engine were on their way to do some switching at a point some distance beyond the car, and were not intending and did not intend *to couple it to the engine or handle it in any way.* This movement was in the hands of others."

The car in that case, also, was out of use.

In the case at bar the very movement in which the plaintiff's intestate met his death arose from the fact that defendant *was using* the out of order car in violation of the statute and was required by reason of his inability to handle the defective car in the usual way because of the defect.

Again, Judge VanDeventer in the Conarty case, says:

> "We are of the opinion that the deceased, who was not endeavoring to couple or uncouple the car, or handle it in any way, but was riding on the colliding engine, was not in a situation where the absence of the prescribed coupler and draw-bar operated as a breach of duty imposed for his benefit."

But, as was pointed out, the deceased in the case at bar was charged with the duty of placing the car on which he was riding as close to the defective car as possible, and in guarding against any damaging collision between the cars (fols. 26, 48), was making

the movement in a different manner than usual because of the defective car, and at the very time of the accident was required to be at a point of danger to prevent a collision with the defective car, which would be damaging to property because of the defect and which would have been harmless without it (fols. 61-63).

Since the Supreme Court has written in the *Layton* and *Gotschall* cases, employees who are not engaged in coupling or uncoupling, or handling defective cars in any way are under the protection of the Act.

Therefore, the State Court was wrong in saying:

> "It was not intended to provide a place of safety between colliding cars."

That contention was not made by the defendant before the Court of Appeals. This misconception originated with that court. Intestate in performing his duties had part of his body, his leg, between the cars as they came together. The collision occurred, doubtless, because he could not stop the three cars he was riding, which were being shunted in on the switch to be left there next to the out of order car, in time to prevent the cars coming together. If defendant had not been unlawfully using this defective car in violation of the Safety Appliance Act, of course, the injury would not have occurred. Or, in another way, if the car had had a lawful coupler on, while the collision, so-called, might have

occurred, being only such a collision as is incident to all car movements in yards, there would have been no close contact and intestate would not have been crushed. It follows very obviously that the Act was intended to provide a safe place between the cars, and if, in case of a collision or such coming together as is incident and usual in the movement of cars in yards occurs, and the employee is between the cars in the doing of his duty, then it must be said that the Act was intended to provide a safe place between colliding cars. In truth, that is just what the Act was intended for, that is, the colliding of cars, as in this case, incident and usual in the movement and switching about and coupling of them in yards or on sidings.

In the case of New York Central Railroad Co. vs. Kimball, the employee, a brakeman, went in between cars, one of them having a defective coupler. The cars were pushed together by the engine and he was crushed because the defective coupler permitted a close contact. The employee recovered; the case went all through the New York courts and was affirmed by the Court of Appeals, 223 N. Y., 711, and an application for a writ of certiorari denied by this Court, 248 U. S., 572.

These actions for violations of the Safety Appliance Act are generally brought in the State Courts. Many such actions are brought in the State of New York. This State is within the Second Judicial Circuit.

It is respectfully submitted that the decision in the Lang case is not only in flat contradiction of the principles laid down in the Layton case and the Gotschall case, but is specifically in conflict with the case of

Erie vs. Russell, 183 Fed. Reporter, 724 (Second Circuit).

In that case plaintiff was repairing a defective coupler. One of the other cars was pushed into the car having the defective coupler, which resulted in injury to the plaintiff. The plaintiff was not engaged in coupling or uncoupling, or in handling the car in any way, except that he was repairing the defective coupler. The Court said:

> "The second question of importance in the case is whether the Trial Court properly submitted to the jury the question whether the presence of the defective coupler was a proximate cause of the accident. It is urged with much force that that which caused the injury to the plaintiff's intestate was the unexpected movement of the three cars—an act unrelated to, and independent of, the act of repairing the coupler. Indeed, were the question to be decided free of authority, a majority of the court would have difficulty in holding that the repair of the coupler was a part of a coupling operation, and bore such a relation to the

> impact of the cars that the necessity for such repairs was an efficient cause of the accident. But still the reason why Russell went to the place where he was injured was the defective coupler, and if he had not gone there the accident would not have occurred."

In the Sixth Circuit in the case of

> Erie R. Co. vs. Schleenbaker, 257 Fed., 667,

the Court has gone even further. The defective car was placed at the back end of a train, and because of this the lights were removed from the caboose to the rear end of the defective car. The removal of these lights caused the conductor of the train to lose his footing and receive the injuries complained of. The Court affirmed a judgment for the plaintiff which determined that the defective coupler was the proximate cause of the conditions which followed.

The Circuit Court of Appeals in the Second Circuit has recently had this question before it in the case of Director General of Railroads vs. Ronald, 265 Fed., 143. In a concurring opinion Circuit Judge Manton says:

> "The defendant below argues that the Safety Appliance Act has no application to the case at bar for the reason that the

plaintiff below was not engaged in coupling or uncoupling cars when he was injured. * * * The legislation was clearly for the safety of employees. Coupling and uncoupling cars is, indeed, but one of the many acts that require the boarding and alighting from cars, and in light of the automatic coupling requirements statute, the need to board and alight from cars solely for the purpose of coupling or uncoupling cars is greatly diminished. The Supreme Court has placed no such construction upon these statutes when it has had occasion in the past to refer to them.

"In Louisville & Nashville R. Co. vs. Layton, 243 U. S., 617; 37 Sup. Ct. Rep. 456; 61 L. Ed., 931, the Court held that the purpose of the Safety Appliance Act was to promote the safety of employees and ruled that it was unlawful for any carrier engaged in interstate commerce to use on its railroad cars not so equipped. Southern R. Co. vs. U. S., 222 U. S., 20, 32 Sup. Ct. 2, 56 L. Ed., 72. The Court there said:

" 'The language of the Acts and the authorities we have cited make it entirely clear that the liability in damages to employees for failure to comply with the law springs from its being made unlawful *to*

> *use cars* not equipped as required—not from the position the employee may be in or the work wihch he may be doing at the moment when he is injured. This effect can be given to the Acts and their wise and humane purpose can be accomplished only by holding, as we do, that carriers are liable to employees in damages whenever the failure to obey these Safety Appliance Laws is the proximate cause *of injury* to them when engaged in the discharge of duty.'
>
> "This positive duty upon the carrier to comply with the statute was recently announced and held to apply where an employee was not engaged in coupling or uncoupling cars, and where it appeared that he was injured because of the failure an an automatic coupler to perform its function. S. R. R. Co. vs. Railroad Commission, 236 U. S., 439, 35 Sup. Ct. 304, 59 L. Ed., 661."

It would, therefore, appear that if a plaintiff brings an action in the Federal Court in the State of New York, the rule of the Russel and Ronald cases will apply. If he brings the action in the State Court, the rule of the Lang case will apply. Of course, a different construction of a Federal statute by the State and Federal Courts in the same jurisdiction which construction leads to pre-

cisely opposite results in the adjustment of the rights of the parties cannot be permitted. The Federal rule must prevail.

It follows from what has already been said, and from the authorities cited in this Court, that when a railroad company uses a car with a defective coupler, that is a violation of the Safety Appliance Acts, and if an injury to an employee is attributable to such defect, such violation is a proximate cause of his injury, even if his injury is caused by the collision or coming together of cars.

POINT II.

THE JUDGMENT OF THE COURT OF APPEALS OF THE STATE OF NEW YORK SHOULD BE REVERSED AND THE JUDGMENTS OF THE TRIAL COURT AND APPELLATE DIVISION OF THE SUPREME COURT OF THAT STATE REINSTATED AND AFFIRMED.

JULIUS A. SCHRIEBER,
Attorney for Plaintiff-in-error,

Office and P.O. Address,
104 Erie County Bank Bldg.,
Buffalo, N. Y.

HAMILTON WARD
and
IRVING W. COLE,
Of Counsel.

Supreme Court of the United States

OCTOBER TERM 1919.

NO. ~~615~~ 290

ANNA LANG as Administratrix of the Goods, Chattels and Credits of OSCAR G. LANG, Deceased,

Petitioner,

vs.

NEW YORK CENTRAL RAILROAD COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

LOCKE, BABCOCK, SPRATT & HOLLISTER,
Attorneys for Respondent.

MAURICE C. SPRATT,
Of Counsel.

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BATAVIA, N. Y.

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CASES CITED.

Supreme Court of the United States

October Term 1919.
No. 817.

ANNA LANG, as Administratrix of the Goods, Chattels and Credits of OSCAR G. LANG, deceased,

Petitioner,

vs.

NEW YORK CENTRAL RAILROAD COMPANY,

Respondent.

BRIEF IN OPPOSITION TO THE APPLICATION.

STATEMENT OF FACTS.

The facts in this case, which are undisputed, are to the effect:

That plaintiff's intestate's train, a way freight (Fol. 66) was eastbound, having started from Erie and being destined for Buffalo (Fols. 64-5); arrived at Silver Creek at 11.25 a. m. on the 1st day of November, 1917 (Fol. 173). The train came in and stopped on track No. 1 (Fol. 126).

At Silver Creek they were to take on a car which was destined for Farnham, the next station east (Fol. 129). This car for Farnham, A. L. E. & W.

12085 (Fol. 116) was on what is known as the house-track at Silver Creek, and next east was the defective car known as "A. & W. P. car 2936" (Fol. 115). The westerly end of the latter car was defective in that the drawbar was out, which included the coupling and knuckle, (Fols. 80-1). This car was in good condition when it reached Silver Creek some time before, but in shifting it around the yard the drawbar had been pulled out (Fols. 106-7).

This defective car was loaded with iron consigned to the Huntley Manufacturing Company at Silver Creek (Fol. 120), had been moved at least on two occasions previous to the accident, and after it was in this defective condition, by plaintiff's intestate and his crew (Fols. 173-4, 184). The Huntley Manufacturing Company had been unable to complete the unloading of the car, and some time before the accident it had been placed on the house-track for the purpose of unloading it into the freighthouse (Fols. 122-3).

The New York Central car which was destined for Farnham stood just west of this defective car, but was not connected with it in any way, and at the time in question it was not intended that this crew should have anything to do with the defective car, nor was it necessary for them to come in contact with it in any way (Fols. 190-1).

The conductor talked the matter over with members of his crew, including plaintiff's intestate, and they determined that on account of this defective car they could not reach the Farnham car

from the easterly end of the switch; so they determined that the proper way to get the Farnham car was to enter the houseswitch from the westerly end (Fols. 174-6).

After this conversation between them, the engine went in on the westerly end of the house-track, plaintiff's intestate being on the engine and in control of it. They pulled out the string of six cars (including the car for Farnham), which were just west of the crippled car (Fol. 136). Lang and Chessel the two brakemen, shunted the Farnham car out onto the passing siding, so that it could be placed in the train (Fol. 137). They placed two of the other cars they had hauled out on the grape track, which is the track south of the station and is used for the loading of grapes in the grape season (Fol. 136). Then they kicked the other three cars they had hauled out back onto the house-track (Fols. 129-130, 139), and the plaintiff's intestate rode in on these three cars. The leading or most westerly car was New York Central refrigerator car No. 152485 (Fols. 118-119), and the brake on this car was on the easterly end of it.

It was only intended to place them so they would clear side track (Fols. 143-4, 178). There was plenty of room for this, as they were placing three cars in the space which had just been occupied by six.

The last seen of plaintiff's intestate previous to the accident was by the conductor, who said he saw him mounting these three cars when they

were five or six car lengths from the defective car (Fol. 146); the next time he was noticed was when the engine was moving easterly over the passing siding, and when they were at a point opposite to New York Central car No. 152485 they saw the intestate clinging to the brake, with one of his legs hanging down and blood running from it (Fols. 155, 164-5). The complaint alleges (Fol. 17) that, while attempting to apply the brakes on the car, plaintiff's intestate's right foot slipped off the end of the car and that while in the act of pulling himself up his leg was caught between the running boards of the two cars.

An examination showed that the running-board of the New York Central car on which plaintiff's intestate was riding was freshly splintered about eight or ten feet back from the end. The middle running-board had been recently loosened and lifted up and there was a fresh nick in the running-board of the crippled car. It was also shown from the measurements of the car that the defective car was lower in height than the refrigerator car. On account of the lack of draw-head and couplers these two cars came together, and the running-board of the crippled car may have passed under the running-board of the refrigerator car and caught intestate's leg at a point where he would be standing when he was setting the brake (Fols. 223-5, 233). These cars stood about two or three feet apart after the accident (Fol. 155).

The handbrake on this freight car was in good condition (Fols. 226, 230).

Plaintiff's intestate knew that the crippled car was there, knew that it was defective and what the defect was, it having been previously discussed by him and his crew. He knew its exact location, as he went in there and took the other cars out. The movements were under his control. He did not need to have the cars kicked in. The engine was also under his control as to the speed at which the cars were shunted in, and he could have put them in there at a fast or slow rate, as the conditions warranted. He having moved this crippled car before on two occasions, knew of its condition, and could see at a glance that the drawbars and couplers being out there was nothing to prevent the two cars coming in contact with each other, unless kept under control. It was broad daylight, and there was absolutely no reason for his not seeing and knowing what the situation was right up to the time of the accident.

There was plenty of room on the house-track to place the cars that he was putting in so that they would not come in contact with the end of this defective car, the fact being that he had taken out six cars that were standing on this house-track west of this defective car; that out of the six, one car was to go to Farnham, and the other two were put in on the grape track to be loaded; so that he had only three cars to put back in the space where formerly six had stood. There was therefore absolutely no excuse for his placing the car upon which he was riding up against the defective car. The other two cars he was riding down also had brakes on them, and if there was any danger of these cars colliding with the defective car, the intestate could have mounted one of

the other two cars. Or if he did not want to do any of these things he could have had the engine shunt them in at such a slow rate that there would be no trouble about stopping before they reached the defective car; or he could have had the engine push them in slowly and hold on to them until the engine itself had stopped them at a point before they reached the defective car.

The movements were under the signal control of plaintiff's intestate. He knew the situation. He knew the car was defective. He had talked with the conductor just before they started the movement and knew that the reason they had to go in on the west end instead of on the east end was due to the fact that the westerly end of the car was defective.

There was no need and it was not the intention to couple onto or move the defective car or to come in contact with it.

The conductor testifies (Fol. 191):

"Q. Was it the intention of your crew to couple onto this defective car?

A. No, sir.

Q. Was it the intention to move or change this defective car in any way?

A. No, sir."

At (Fol. 143) he testified:

"Q. Was that your practice to put it up against the other car?

Mr. Spratt: I object to that as leading and suggestive.

Q. Is that correct?

A. No, sir, to leave it in to clear the side track, the three cars."

And at (Fol. 144):

"Q. What did he have to do up there?
A. Set the brake to stop them when they got into clear.
Q. By getting into clear you mean?
A. The side track."

Really the better place for him to have been was on the last car so that he could have observed when these three cars cleared the side track.

Judge Wheeler in his opinion (Fol. 279) states:

"It evidently was not the intention of any of the crew to disturb, couple onto or move the crippled car."

Andrews, J., writing the opinion of the Court of Appeals said:

"There was no attempt to couple onto the defective car or to handle it in any way."

ARGUMENT.

The Trial Court and the Court of Appeals have both distinctly held that there was no intention to or attempt to couple onto the defective car or to handle it in any way. This fact has been finally and conclusively established against the plaintiff, and as we understand the rule this finding of fact will be adopted by this court.

The record discloses, and it is in fact conceded on page 11 of petitioner's brief, that the condition of this car was well known to the crew, including intestate, and that because of its condition they were purposely avoiding coupling to it or in any way moving it.

The record also discloses, and it is in fact conceded on page 13 of petitioner's brief, that the

collision occurred because intestate did not stop the cars, as he intended to do, before they came in collision with the defective car.

Manifestly the proximate cause of the injury was the failure of intestate to stop the cars. The trial judge was of the opinion (record, page 97) that the absence of the coupler was the proximate cause of the injury. The Court of Appeals clearly was right in holding that the collision was not the proximate result of the absence of the coupler and drawbar, and the reversal of the judgment and dismissal of the complaint was not error. We will present further argument in our answers to the various points mentioned in petitioner's brief.

POINT I.

Under Point I of petitioner's brief precisely the same reasons are given why this court should grant the application, as were presented to the Court of Appeals to sustain the decision of the lower state courts. There is but one contention that merits a reply, namely, the assertion that this court by its decisions in the Layton case (243 U. S. 617) and the Gotschall case (244 U. S. 66) has overruled the Conarty case (238 U. S. 243). It is a matter of common knowledge that the decisions of any court depend upon the facts established in each case. The Court of Appeals of this state sees no conflict between the decision in the Conarty case and the decisions in the Layton and Gotschall cases. We believe that if this court had intended to overrule the Conarty case, it would frankly have so stated and given its reasons for so doing.

In neither the Layton or Gotschall cases do we find any expression of this court, which in the slightest sustains the claim of the petitioner.

Mr. Justice Andrews, in writing the opinion for the Court of Appeals, succinctly and correctly, we believe, states the distinction between the Conarty case and the Layton and Gotschall cases. This opinion, to which we refer the court, is a complete answer to petitioner's contention, but because of the attitude of the petitioner we are constrained to briefly review these cases.

In the Conarty case an employe of a railroad not endeavoring or intending to couple a car having defective couplers, or to handle it in any way, was riding on the footboard of an engine, which collided with it, and was killed in the collision. Had the coupler and drawbar been in place the engine and body of the car would have been kept sufficiently apart to have prevented the injury, but in their absence the engine came in immediate contact with the sill of the car with the result stated. The car was about to be placed on an isolated track for repairs and had been left near the switch leading to that track while various cars were being moved out of the way—a task taking about five minutes. This court said, page 249:

> "The principal question in the case is whether at the time he was injured the deceased was within the class of persons for whose benefit the Safety Appliance Acts required that the car be equipped with automatic couplers and drawbars of standard height; or, putting it in another way, whether his injury was within the evil against which the provisions for such appliances are directed. It is not claimed, nor could it be un-

> der the evidence, that the collision was proximately attributable to a violation of those provisions, but only that had they been complied with it would not have resulted in injury to the deceased."

and at pages 250-251:

> "It is very plain that the evils against which these provisions are directed are those which attended the old fashioned link and pin couplings where it was necessary for men to go between the ends of the cars to couple and uncouple them, and where the cars when coupled into a train sometimes separated by reason of the insecurity of the coupling. In Johnson v. Southern Pacific Co., 196 U. S. 1, 19, this court said of the provision for automatic couplers that 'The risk in coupling and uncoupling was the evil sought to be remedied'; and in Southern Ry. v. Crockett, 234 U. S. 725, 737, it was said to be the plain purpose of the two provisions that 'where one vehicle is used in connection with another, that portion of the equipment of each that has to do with the safety and security of the attachment between them shall conform to standard.' *Nothing in either provision gives any warrant for saying that they are intended to provide a place of safety between colliding cars.* On the contrary, they affirmatively show that a principal purpose in their enactment was to obviate 'the necessity for men going between the ends of the cars. 27 Stat. 531.'
>
> We are of the opinion that the deceased, who was not endeavoring to couple or uncouple the car or to handle it in any way but was riding on the colliding engine, was not in a situation where the absence of the prescribed coupler and drawbar operated as a breach of a duty imposed for his benefit, and that the Supreme Court of the State erred in concluding that the Safety Appliance Acts required it to hold otherwise." (Italics ours).

The facts in the *Conarty* case are almost, if not precisely the same as the facts in the Lang case, except, if anything, this case is more favorable to the defendant. There, as here, the intestate was engaged in interstate commerce. In both cases there was no intention to couple on to the car or handle it in any way. Conarty was riding on the footboard of the colliding engine. Lang was riding on the cars which collided with the defective car. In the *Conarty* case the defective car was, in about five minutes time, to be placed on an isolated track for repairs, but while awaiting that movement had been left near the switch leading to that track in order that other cars might be moved out of the way. Here the defective car was standing on a house track awaiting unloading, and there was no purpose or intention of disturbing it at all. In the *Conarty* case the accident happened at night, and the intestate knew nothing of the condition of the car or its location. Here the intestate knew all about the location of the car, its defective condition and it was his purpose to stop the cars upon which he was riding before they came in contact with the defective car. There, as here, the presence of the coupler and drawbar might have kept the cars apart and possibly the injury would not have resulted. In both cases the collision was the proximate cause of the injury.

Unless this court has, by its recent decisions, disapproved the *Conarty* case, that decision must be applied to the case at bar, in fact there is greater reason for applying those principles here than there was in the text case.

We have no quarrel with the decisions in the *Layton* and *Gotschall* cases, but we do dispute the claim of the petitioner that they are controlling here, in that they overrule the Conarty case.

In the *Layton* case the plaintiff was a switchman and was engaged under the following circumstances:

> "A train of many cars standing on a switch was separated by about two car lengths from five cars on the same track loaded with coal. An engine, pushing a stock car ahead of it, came into the switch, and failed in an attempt to couple to the five cars but struck them with such force, that although the engine with the car attached stopped within half a car length, the five loaded cars were driven over the two intervening car lengths and struck so violently against the standing train that the plaintiff, who was on one of the five cars for the purpose of releasing brakes, was thrown to the track." (pages 618-619).

There it was a defective coupler which prevented the engine from coupling to the five cars and brought about the accident. It was intended to couple onto these five cars on which plaintiff stood, and it was the very act of coupling and the defective coupler which brought about the accident.

In the *Gotschall* case the train upon which Gotschall was riding separated because of the opening of a coupler on one of the cars, resulting in an automatic setting of the emergency brake, which threw Gotschall off the train and under the wheels.

Certainly the Safety Appliance Act was applicable in the *Gotschall* case under the rule laid down

by this court in the *Conarty* case, where the court held that one of the evils against which the provisions were directed was:

> "Where the cars when coupled into a train sometimes separate by reason of the insecurity of the coupling."

There is not the slightest evidence in this case from which it can be claimed that the collision was proximately attributable to a violation of the Safety Appliance Acts. Here, as in the Conarty case, the most that can be urged is, that, had the acts been complied with, the injury to intestate would have been avoided. The defective coupler here did not contribute any more to the injury to intestate than did the defective coupler involved in the *Conarty* case. For this reason the authorities cited by petitioner, as bearing out the contention that if the defective coupler contributed in whole or in part to the injury, that is sufficient to establish liability under the Safety Appliance Act, are inapplicable. In fact, in all of the cases cited, the violation of the Act was the proximate cause of the injury.

In the *Huxell* case, 245 U. S., 538, there was a defective condition of the power brake. With proper brakes the engine could have been stopped within 40 feet. It ran more than 135 feet. The question was whether the deceased, who survived the accident for fifteen hours did not receive injuries which contributed to his death, during the time the engine was negligently run for 100 feet at least.

In the *Wagner* case, 241 U. S., 476, a brakeman, em[illegible]ed in interstate commerce, was endeavor-

ing to make a coupling between an engine and car. The coupling did not make on the first impact. On the next attempt he noticed that the drawhead on the engine was out of position and put his left foot in to shift it over so that the coupling would make. His right foot slipped on the footboard and his left foot was caught between the drawheads and crushed.

In the *Parker* case, 242 U. S., 56, there was no dispute but that the case was governed by the Safety Appliance Act. Parker was engaged in coupling a tender to a car. The coupling did not make the first time and Parker, noticing the drawheads were not in line, put in his arm to straighten them and was caught.

In the *Otos* case, 239 U. S., 349, the coupler was out of order, *the pin-lifter was missing*, and other repairs were needed. The car had been marked for repairs and was being switched to the repair track. Plaintiff being unable to uncouple the disabled car from the side where the pin-lifter was missing without going between the cars, did so while the cars were moving and was hurt.

In the *Rigsby* case, 241 U. S., 33, plaintiff fell owing to a defect in one of the handholds or grabirons that form the rungs of a ladder while he was descending the ladder.

In the *Delk* case, 220 U. S., 580, a loaded car being used in moving interstate commerce was found with a defective coupler. The car was marked "In bad order" and a repair piece sent

for. The car was not withdrawn from service, but the company kept moving it about in connection with other cars, and finally ordered the plaintiff to couple it to another car. The chain connecting the uncoupling lever to the lock-pin or lock-block, was disconnected, owing to a break in the lock-pin or lock-block. The drawbar had also a lateral motion of four inches. Plaintiff undertook to hold the drawbar away with his foot, from the side upon which he stood, so that the two couplers would couple by impact. In doing so his foot was injured.

In the *Lindsay* case, 233 U. S., 42, the couplings failed several times to couple automatically. Plaintiff went betwen the cars for the purpose of ascertaining and remedying if possible the cause of the trouble. Before doing so he signaled the engineer to stand fast. While he was between the cars, and engaged in handling the couplers the cars were pushed together and his arm was crushed.

In the *Spokane, etc.* case, 217 Fed., 524, the Safety Appliance Act was not involved.

In the *Schleenbacker* case, 257 Fed., 667, the company was hauling a car without drawbar or coupler, contrary to the express provisions of the act. This necessitated attaching it to the rear of the caboose, as a result of which the lights from the rear of the caboose had to be removed to the rear end of the defective car. The whole situation was created solely because of the use of the defective car.

We submit that there is no conflict between the law as expounded by this court and by the Court of Appeals of the State of New York. That there is no confusion as to the interpretation of the *Conarty, Layton* and *Cotschall* cases. The precise question here presented has been clearly decided by this court adversely to the petitioner's contention, and no question of public interest or of general importance is involved herein which has not already been given full consideration by this court. We again reiterate that had this court intended to overrule the Conarty case it would have specifically so stated. It is not the purpose or intention of this court to leave litigants in doubt as to the application of its decisions, and this claim, so strenuously urged by the petitioner, has absolutely no merit when the decisions are read in the light of the facts established in each case.

POINT II.

The Court of Appeals did not err in dismissing the complaint. In any event the question is not one which this court will review.

A.

At the close of plaintiff's case the defendant's counsel moved for a nonsuit (Fols. 207-208). The plaintiff's counsel at that time clearly indicated that he was standing squarely on the violation of the Safety Appliance Act (Fols. 209-212).

At the close of the defendant's case the defendant's counsel moved for a direction of a verdict (Fols. 240-241).

The Trial Court then held that absolute liability had been established under the Safety Appliance Act, and that he would submit to the jury simply the question of damages (Fols. 242-244). Plaintiff's counsel took no exception to the ruling of the court. He did not ask that the court submit to the jury any question under the Federal Employers' Liability Act, nor did he request the court to submit to the jury any question as to whether the alleged violation of the Safety Appliance Act was the proximate cause of the injury to the plaintiff.

An examination of the record will disclose to the court that the only proof illicited by the plaintiff, as establishing his cause of action, pertains to the violation of the Safety Appliance Act. Throughout the trial, and at the time the verdict for the plaintiff was directed, the plaintiff elected to submit her cause on but one ground of negligence, namely, a violation of the Safety Appliance Act. By trying the case upon this theory and by consenting to a directed verdict based solely upon a violation of the Safety Appliance Act, the plaintiff expressly waived her rights to go to the jury on any other question, and is now estopped from claiming that the Court of Appeals should have granted a new trial in order to permit her to prove her case under the Federal Employers' Liability Act. She is also estopped from claiming that the Court of Appeals should have granted a new trial in order that the question of proximate cause be submitted to the jury.

Second National Bank vs. Weston, 161 N. Y., 520.

Ormes vs. Dauchy, *et al.*, 82 N. Y. 443.
Parker-Smith vs. Prince Mfg. Co., 172 App. Div. (N. Y.) 302.

Furthermore, this contention has to do entirely with state practice and procedure, which this court will decline to review. The action of the Court of Appeals in dismissing the complaint, rather than granting a new trial, was purely procedural, and within the power of the court under Section 1337 of the Code of Civil Procedure of this state, which provides in part as follows:

> "In any action on an appeal to the Court of Appeals, the court may either modify or affirm the judgment or order appealed from, award a new trial, or grant to either party such judgment as such party may be entitled to."

Pangburn vs. Buick Motor Co., 211 N. Y., 228, 236.
Schoenherr vs. Van Meter, 215 N. Y., 548, 553.

The case was tried upon its merits and the Court of Appeals has held that upon the facts found the defendant is entitled to judgment dismissing the complaint. Under these circumstances this court will decline to review this question.

Baughm vs. N. Y. Phila. & Norfolk R. R., 241 U. S. 237.
Great Northern Ry. vs. Knapp, 240 U. S., 464.
Chicago Junction Ry. vs. King, 222 U. S., 222.

Point II of petitioner's brief obviously is based on the pretended claim that the plaintiff was de-

nied some federal right by the State Court. No such question is involved in the case. Neither upon the trial of the action, nor upon presentment of this appeal in the Appellate Division or in the Court of Appeals have these questions been raised. They have, therefore, not been passed upon by the State Court. Plaintiff contented herself with the submission of this cause solely upon a violation of the Safety Appliance Act. Under such circumstances it is academic that she cannot now claim the denial to her by the State Courts of any federal right.

Mutual Life Ins. Co. vs. McGrew, 188 U. S. 291.

Louisville & Nashville R. R. vs. Woodford, 234 U. S., 46.

B.

The claim that the question as to whether or not the violation of the Safety Appliance Act was the proximate cause of the injury was one for the jury and that, therefore, the Court of Appeals should have granted a new trial is without merit for other reasons than those assigned under subdivision A of this point.

There is nothing in the Federal Employers' Liability Act or in the Safety Appliance Acts that makes the question of proximate cause absolutely one for the jury. Under the decisions of this court the question of proximate cause may become one of law when the facts are clearly shown, and but one inference is to be drawn therefrom.

Choctaw O. & G. R. Co. vs. Holloway, 191 U. S., 334.

Roberts' "Federal Liability of Carriers," Vol. 2, p. 1327.
New York Central R. R. Co. vs. Kimball, 248 U. S. 572.

In the Kimball case the Trial Court directed a verdict for the plaintiff. The defendant made timely request to go to the jury on the question as to whether the defective car was the proximate cause of the accident. The motion was denied and an exception taken. This question was raised on appeal in all State Courts, and the judgment was affirmed. Petition for writ of certiorari was presented to this court and this precise question fully presented. The writ was denied.

POINT III.

The writ should be denied for the reason that the judgment of the Court of Appeals was subject to reconsideration by that court.

Section 237 of the Judicial Code provides only for review by this court of a cause "wherein a "final judgment or decree has been rendered or "passed by the highest court of the state in which "a decision could be had."

Rule 20 of the rules of the Court of Appeals of the State of New York provides as follows:

"RULE XX. Motions for Reargument.

Motions for reargument must be submitted on printed briefs (eighteen copies) without oral argument, on five days' notice of the adverse party, stating briefly the ground upon which a reargument is asked, and the points supposed to have been overlooked or misap-

prehended by the court, with proper reference to the particular portion of the case and to the authorities relied upon. A copy of the brief shall be served on the adverse party with the notice of motion."

Under the rule above quoted the Court of Appeals had discretion to grant a reargument of this cause and the jurisdiction and right to render a different decision if convinced that it had committed error in the respects claimed by the petitioner. No application to the Court of Appeals for reargument of this cause has been made. For this reason the writ should be denied.

Andrews v. Virginia Railway Co., 248 U. S., 272.

Chicago, G. W. R. R. Co. v. Basham, 249 U. S., 164.

POINT IV.

The application for the writ should be denied.

LOCKE, BABCOCK, SPRATT & HOLLISTER,
Attorneys for Respondents,
Office and P. O. Address,
810-826 Fidelity Bldg.,
Buffalo, N. Y.

MAURICE C. SPRATT,
Of Counsel.

BATAVIA TIMES, LAW PRINTERS
BATAVIA, N. Y.

Supreme Court of the United States

OCTOBER TERM 1919.
NO. 290

ANNA LANG, as Administratrix of the Goods, Chattels and Credits of OSCAR G. LANG, deceased,
Plaintiff-in-Error,
vs.
NEW YORK CENTRAL RAILROAD COMPANY,
Defendant-in-Error.

BRIEF FOR DEFENDANT IN-ERROR.

LOCKE, BABCOCK, SPRATT & HOLLISTER,
Attorneys for Defendant-in-Error.
Office & P. O. Address,
814 Fidelity Building,
Buffalo, N. Y.

MAURICE C. SPRATT,
Of Counsel.

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TABLE OF CASES

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NEW YORK CENTRAL RAILROAD COMPANY,
Defendant-in-Error.

Brief for Defendant in-error.

STATEMENT OF FACTS

That plaintiff's intestate's train, a way freight (Fol. 22) was eastbound, having started from Erie and being destined for Buffalo. The train came in and stopped on track No. 1 (Fol. 42).

At Silver Creek they were to take on a car which was destined for Farnham, the next station east (Fol. 43). This car for Farnham, A. L. E. & W. 12085 was on what is known as the house-track at Silver Creek, and next east was the defective car known as "A. & W. P. car 2936" (Fol. 39). The westerly end of the latter car was

defective in that the drawbar was out, which included the coupling and knuckle, (Fol. 27). This car was in good condition when it reached Silver Creek some time before, but in shifting it around the yard the drawbar had been pulled out (Fol. 36).

This defective car was loaded with iron consigned to the Huntley Manufacturing Company at Silver Creek (Fol. 40), had been moved at least on two occasions previous to the accident, and after it was in this defective condition, by plaintiff's intestate and his crew (Fols. 58, 62). The Huntley Manufacturing Company had been unable to complete the unloading of the car, and some time before the accident it had been placed on the house-track for the purpose of unloading it into the freighthouse (Fol. 41).

The New York Central car which was destined for Farnham stood just west of this defective car, but was not connected with it in any way (fol. 46) and at the time in question it was not intended that this crew should have anything to do with the defective car, nor was it necessary for them to come in contact with it in any way (Fol. 64).

The conductor talked the matter over with members of his crew, including plaintiff's intestate, and they determined that on account of this defective car they could not reach the Farnham car from the easterly end of the switch; so they determined that the proper way to get the Farnham car was to enter the houseswitch from the westerly end (Fols. 58, 59).

After this conversation between them, the engine went in on the westerly end of the house-track, plaintiff's intestate being on the engine.

They pulled out the string of six cars (including the car for Farnham), which were just west of the crippled car (Fol. 46). Lang and Chessel the two brakemen, shunted the Farnham car out onto the passing siding, so that it could be placed in the train (Fol. 46). They placed two of the other cars they had hauled out on the grape track, which is the track south of the station and is used for the loading of grapes in the grape season (Fol. 46). Then they kicked the other three cars they had hauled out back onto the house-track (Fols. 43, 44, 47), and the plaintiff's intestate rode in on these three cars (Fol. 48). The leading or most westerly car was New York Central refrigerator car No. 152485 (Fol. 40), and the brake on this car was on the easterly end of it. (Fol. 54).

It was only intended to place them so they would clear the side track (Fols. 48, 60). There was plenty of room for this, as they were placing three cars in the space which had just been occupied by six. (Fol. 60).

The last seen of plaintiff's intestate previous to the accident was by the conductor, who said he saw him mounting these three cars when they were five or six car lengths from the defective car (Fol. 49); the next time he was noticed was when the engine was moving easterly over the passing siding, and when they were at a point

opposite to New York Central car No. 152485 they saw the intestate clinging to the brake, with one of his legs hanging down and blood running from it (Fols. 52, 55). The complaint alleges (Fol. 6 that, while attempting to apply the brakes on the car, plaintiff's intestate's right foot slipped off the end of the car and that while in the act of pulling himself up his leg was caught between the running boards of the two cars.

An examination showed that the running-board of the New York Central car on which plaintiff's intestate was riding was freshly splintered about eight or ten feet back from the end. The middle running-board had been recently loosened and lifted up and there was a fresh nick in the running-board of the crippled car. It was also shown from the measurements of the car that the defective car was lower in height than the refrigerator car. On account of the lack of draw-head and couplers these two cars came together, and the running-board of the crippled car may have passed under the running-board of the refrigerator car and caught intestate's leg at a point where he would be standing when he was setting the brake (Fols. 75, 78). These cars stood about two or three feet apart after the accident (Fol. 52).

The handbrake on this freight car was in good condition (Fol. 76).

Plaintiff's intestate knew that the crippled car was there, knew that it was defective and what the defect was, it having been previously discussed by him and his crew (Fols. 58, 59). He knew its exact location, as he went in there and took the other

cars out. The movements were under his control. He did not need to have the cars kicked in. The engine was also under his control as to the speed at which the cars were shunted in, and he could have put them in there at a fast or slow rate, as the conditions warranted. He having moved this crippled car before on two occasions, knew of its condition, and could see at a glance that the draw-bars and couplers being out there was nothing to prevent the two cars coming in contact with each other, unless kept under control. It was broad daylight, and there was absolutely no reason for his not seeing and knowing what the situation was right up to the time of the accident. In fact he knew the situation perfectly before the work was commenced.

There was plenty of room on the house-track to place the cars that he was putting in so that they would not come in contact with the end of this defective car, the fact being that he had taken out six cars that were standing on this house-track west of this defective car; that out of the six, one car was to go to Farnham, and the other two were put in on the grape track to be loaded; so that he had only three cars to put back in the space where formerly six had stood. There was therefore absolutely no excuse for his placing the car upon which he was riding up against or close to the defective car, and such was not the intention (Fols. 48, 60). The other two cars he was riding down also had brakes on them, and if there was any danger of these cars colliding with the defective car, the intestate could have mounted one of

the other two cars. Or if he did not want to do any of these things he could have had the engine shunt them in at such a slow rate that there would be no trouble about stopping before they reached the defective car; or he could have had the engine push them in slowly and hold on to them until the engine itself had stopped them at a point before they reached the defective car.

He knew the situation. He knew the car was defective. He had talked with the conductor just before they started the movement and knew that the reason they had to go in on the west end instead of on the east end was due to the fact that the westerly end of the car was defective.

There was no need and it was not the intention to couple onto or move the defective car or to come in contact with it.

The conductor testifies (Fol. 64):

"Q. Was it the intention of your crew to couple onto this defective car?

A. No, Sir.

Q. Was it the intention to move or change this defective car in any way?

A. No, sir."

At (Fol. 48) he testified:

"Q. Was that your practice to put it up against the other car?

Mr. Spratt: I object to that as leading and suggestive.

Q. Is that correct?

A. No, sir, to leave it in to clear the side track, the three cars."

* * * *

"Q. What did he have to do up there?

A. Set the brake to stop them when they get into clear.

Q. By getting into clear you mean?

A. The side track."

Really the better place for him to have been was on the last car so that he could have observed when these three cars cleared the side track.

Judge Wheeler in his opinion (Fol. 93) states:

"It evidently was not the intention of any of the crew to disturb, couple onto or move the crippled car."

Andrews, J., writing the opinion of the Court of Appeals said, (Fol. 110):

"There was no attempt to couple onto the defective car or to handle it in any way."

POINT I.

The Judgment entered on the decision of the Court of Appeals should be affirmed and the writ of certiorari dismissed.

The Court of Appeals of the State of New York held that under all the circumstances disclosed by the record, the deceased was not one of the persons for whose benefit the safety appliance act was passed and that the collision was not the proximate result of the absence of the coupler and draw bar.

That court clearly was right in holding that this case, under the facts disclosed, was ruled by *St. Louis and San Francisco R. R. Co. vs. Conarty*, 238 U. S. 243.

Mr. Justice Andrews, in writing the opinion succinctly and correctly, (fols. 109, 110) states the distinction between the Conarty case and the Layton and Getschall cases which plaintiff-in-error claims are controlling here. This opinion, to which we refer the court, is a complete answer to the assertion that the rule as laid down by the State Court and Federal Courts is conflicting.

In the *Conarty* case an employe of a railroad not endeavoring or intending to couple a car having defective couplers, or to handle it in any way, was riding on the footboard of an engine, which collided with it, and was killed in the collision. Had the coupler and drawbar been in place the engine and body of the car would have been kept sufficiently apart to have prevented the injury, but in their absence the engine came in immediate contact with the sill of the car with the result stated. The car was about to be placed on an isolated track for repairs and had been left near the switch leading to that track while various cars were being moved out of the way—a task taking about five minutes. This court said, page 249:

> "The principal question in the case is whether at the time he was injured the deceased was within the class of persons for whose benefit the Safety Appliance Acts required that the car be equipped with 'auto-

matic couplers and drawbars of standard height; or, putting it in another way, whether his injury was within the evil against which the provisions for such appliances are directed. It is not claimed, *nor could it be under the evidence, that the collision was proximately attributable to a violation of those provisions*, but only that had they been complied with it would not have resulted in injury to the deceased." (*Italics ours*).

and at pages 250-251:

"It is very plain that the evils against which these provisions are directed are those which attended the old fashioned link and pin couplings where it was necessary for men to go between the ends of the cars to couple and uncouple them, and where the cars when coupled into a train sometimes separated by reason of the insecurity of the coupling. In Johnson vs. Southern Pacific Co., 196 U. S. 1, 19, this court said of the provision for automatic couplers that 'The risk in coupling and uncoupling was the evil sought to be remedied'; and in Southern Ry: v. Crockett, 234 U. S. 725, 737, it was said to be the plain purpose of the two provisions that 'where one vehicle is used in connection with another, that portion of the equipment of each that has to do with the safety and security of the attachment between them shall conform to standard.' *Nothing in either provision gives any warrant for saying that they are intended to provide a place of safety between col-*

liding cars. On the contrary, they affirmatively show that a principal purpose in their enactment was to obviate 'the necessity for men going between the ends of the cars. 27 Stat. 531.'

We are of the opinion that the deceased, who was not endeavoring to couple or uncouple the car or to handle it in any way but was riding on the colliding engine, was not in a situation where the absence of the prescribed coupler and drawbar operated as a breach of a duty imposed for his benefit, and that the Supreme Court of the State erred in concluding that the Safety Appliance Acts required it to hold otherwise." (Italics ours).

The facts in the *Conarty* case are almost, if not precisely the same as the facts in the Lang case, except, if anything, this case is more favorable to the defendant. There, as here, the intestate and the railroad were engaged in interstate commerce. In both cases there was no intention to couple on to the car or handle it in any way. Conarty was riding on the footboard of the colliding engine. Lang was riding on the cars which collided with the defective car. In the *Conarty* case the defective car was, in about five minutes time, to be placed on an isolated track for repairs, but while awaiting that movement had been left near the switch leading to that track in order that other cars might be moved out of the way. Here the defective car was standing on a house track await-

ing unloading, and there was no purpose or intention of disturbing it at all. The car in that case was just as much in use by the railroad as was the car involved here. In *Conarty* case the accident happened at night, and the intestate knew nothing of the condition of the car or its location. Here the intestate knew all about the location of the car, its defective condition and it was his purpose to stop the cars upon which he was riding before they came in contact with the defective car. The work was being done as it was for the express purpose of avoiding contact with or the use of the defective car. There, as here, the presence of the coupler and drawbar might have kept the cars apart and possibly the injury would not have resulted. In both cases the collision was the proximate cause of the injury.

Plaintiff-in-error in an effort to distinguish the Conarty case from the present one, makes certain statement in her brief which we respectfully submit are not in accord with the facts as stated by this court in its opinion in the *Conarty* case.

The statement is made on page 14:

> "For in that case the out of order car was standing on an isolated switch waiting for repairs; out of commission, and out of use by the defendant."

and at page 22:

> "The car in that case, also, was out of use."

The court in its opinion, page 248, says:

> "The car was *about* to be placed on an iso-

> lated track for repairs, and was left near the switch leading to that track while other cars were being moved out of the way,—a task taking about five minutes." (Italics ours).

We submit that the defective car in the Conarty case was *in* use by the railroad. It had been dropped for a period of only five minutes to enable the crew to make a place for it on the isolated repair track, and as soon as this was done it was the intention to move it to that track. Here the entire crew, including intestate, were studiously avoiding the use, in any way, of the defective car, and it was not their intention to move it or come in contact with it.

The trial court and the Court of Appeals, both having distinctly held that there was no intention to disturb, couple onto or in any way handle the defective car, we submit that this fact has been conclusively established against the plaintiff-in-error, and as we understand the rule the concurrent judgment of the lower courts will be accepted by this court.

Boehmer v. Pennsylvania R. Co., 252 U. S. 496.

Unless this court has, by its later decisions, disapproved the *Conarty* case, that decision must be applied to the case at bar, in fact there is greater reason for applying those principles here than there was in the text case.

Distinguishing cases cited by plaintiff-in-error.

In the *Layton case* 243 U. S. 617 the plaintiff

was a switchman and was engaged under the following circumstances:

> "A train of many cars standing on a switch was separated by about two car lengths from five cars on the same track loaded with coal. An engine, pushing a stock car ahead of it, came into the switch, and failed in an attempt to couple to the five cars but struck them with such force, that although the engine with the car attached stopped within half a car length, the five loaded cars were driven over the two intervening cars lengths and struck so violently against the standing train that the plaintiff, who was on one of the five cars for the purpose of releasing brakes, was thrown to the track." (page 618-619).

There a defective coupler prevented the engine from coupling to the five cars as intended and the violation of the act was clearly the proximate cause of the injury.

In the *Gotschall* case, 244 U. S. 66, the train upon which Gotschall was riding separated because of the opening of a coupler on one of the cars, resulting in an automatic setting of the emergency brake, which threw Gotschall off the train and under the wheels. The defective coupler was the proximate cause of the injury. The Safety Appliance Act was also applicable in the *Gotschall* case under the rule laid down by this court in the *Conarty* case, where the court said that one of the evils against which the provisions were directed was:

"where the cars when coupled into a train sometimes separate by reason of the insecurity of the coupling."

There is not the slightest evidence in this case from which it can be claimed that the collision was proximately attributable to a violation of the Safety Appliance Acts. Here, as in the Conarty case, the most that can be urged is, that, had the acts been complied with, the injury to intestate would have been avoided. The defective coupler here did not contribute any more to the injury to intestate than did the defective coupler involved in the *Conarty* case. For this reason the authorities cited by petitioner, as bearing out the contention that if the defective coupler contributed in whole or in part to the injury, that is sufficient to establish liability under the Safety Appliance Act, are inapplicable. In fact, in all of the cases cited, the violation of the Act clearly was the proximate cause of the injury.

In the *Huxell* case, 245 U. S., 535, there was a defective condition of the power brake. With proper brakes the engine could have been stopped within 40 feet. It ran more than 135 feet. The question was whether the deceased, who survived the accident for fifteen hours did not receive injuries which contributed to his death, during the time the engine was negligently run for 100 feet at least.

In the *Wagner* case, 241 U. S., 476, a brakeman, employed in interstate commerce, was endeavor-

ing to make a coupling between an engine and car. The coupling did not make on the first impact. On the next attempt he noticed that the drawhead on the engine was out of position and put his left foot in to shift it over so that the coupling would make. His right foot slipped on the footboard and his left foot was caught between the drawheads and crushed.

In the *Parker* case, 242 U. S., 56, there was no dispute but that the case was governed by the Safety Appliance Act. Parker was engaged in coupling a tender to a car. The coupling did not make the first time and Parker, noticing the drawheads were not in line, put in his arm to straighten them and was caught.

In the *Otos* case, 239 U. S., 349, the coupler was out of order, *the pin-lifter was missing*, and other repairs were needed. The car had been marked for repairs and was being switched to the repair track. Plaintiff being unable to uncouple the disabled car from the side where the pin-lifter was missing without going between the cars, did so while the cars were moving and was hurt.

In the *Rigsby* case, 241 U. S., 33, plaintiff fell owing to a defect in one of the handholds or grabirons that form the rungs of a ladder while he was descending the ladder.

In the *Delk* case, 220 U. S., 580, a loaded car being used in moving interstate commerce was found with a defective coupler. The car was marked "In bad order" and a repair piece sent for. The car was not withdrawn from service, but the company kept moving it about in connec-

tion with other cars, and finally ordered the plaintiff to couple it to another car. The chain connecting the uncoupling lever to the lock-pin or lock-block, was disconnected, owing to a break in the lock-pin or lock-block. The drawbar had also a lateral motion of four inches. Plaintiff undertook to hold the drawbar away with his foot, from the side which he stood, so that the two couplers would couple by impact. In doing so his foot was injured.

In the *Lindsay* case, 233 U. S., 42, the couplings failed several times to couple automatically. Plaintiff went between the cars for the purpose of ascertaining and remedying if possible the cause of the trouble. Before doing so he signaled the engineer to stand fast. While he was between the cars, and engaged in handling the couplers the cars were pushed together and his arm was crushed

In New York Central R. R. Co. vs. Kimball, 248 U. S., 572, the employee went in between cars to adjust a chain used to attach a car with a defective coupler to another car.

In the *Spokane, etc.* case, 217 Fed. 518, the Safety Appliance Act was not involved.

In the *Ronald* case, 265 Fed. 143, the injury was caused by a grabiron giving way.

In the *Schleenbacker* case, 257 Fed., 667, the company was hauling a car without drawbar or coupler, contrary to the express provisions of the act. This necessitated attaching it to the rear of the caboose, as a result of which the lights from the rear of the caboose had to be removed to the

rear end of the defective car. The whole situation was created solely because of the use of the defective car.

An examination of plaintiff's brief will satisfy this court, we believe, that plaintiff's quarrel is entirely with the decision of this court in the Conarty case and that the real contention is that this court has by later decisions overruled the Conarty case.

The Court of Appeals merely held that under the facts disclosed this case was ruled by the Conarty case. It did not hold that the Safety Appliance Act had no application, unless the employee was engaged in coupling or uncoupling, or going between cars for that purpose, as urged on pages 19 and 22 of plaintiff's brief. On the contrary the court below, recognizing the rule laid down by this court in the Layton and Gotschall cases, said:

> "If, however, a collision was proximately caused by the failure of the railroad to obey the statute, it was not intended to hold that only those servants actually engaged in coupling or uncoupling cars could recover for the resulting injuries. Any servant so injured equally comes within the protection of the statute. (Louisville & Nashville Railroad Company v. Layton, 243 U. S., 617; Minn. & St. Louis R. R. Co. v Gotschall, 244 U. S. 66)."

The Court of Appeals of the State of New York did not lay down any rule which in any way conflicts with the decisions of this court, as claimed

by the plaintiff. On the contrary, the opinion indicates that in arriving at its conclusions the Court of Appeals was governed entirely by the decisions of this Honorable Court.

The proximate cause of the accident was the failure of the deceased to stop the cars before they came into collision with the defective car. The absence of the coupler and drawbar was not the proximate cause of the injury, nor was it a concurring cause. This was made clear by this court's decision in the Conarty case, where it was said:

> "It is not claimed, nor could it be under the evidence, that the collision was proximately attributable to a violation of these provisions, but only that had they been complied with it would not have resulted in injury to the deceased."

A most careful analysis of the facts in this case fail to distinguish it from the Conarty case. Unless this Honorable Court has already overruled, or intends to overrule the Conarty decision, none of the errors claimed to have been committed by the said Court of Appeals exist.

FINALLY

We respectfully submit that the judgment entered upon the decision of the Court of Appeals of the State of New York should be affirmed and the writ of certiorari dismissed.

LOCKE, BABCOCK, SPRATT & HOLLISTER,
Attorneys for Defendant-in-Error,
Office and P. O. Address,
810-826 Fidelity Bldg.,
Buffalo, N. Y.

MAURICE C. SPRATT,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

No. 290.—October Term, 1920.

Anna Lang, as Administratrix, &c., of Oscar G. Lang, Deceased, Petitioner, vs. New York Central Railroad Company. } On Writ of Certiorari to the Supreme Court of the State of New York.

[March 28, 1921].

Mr. Justice McKenna delivered the opinion of the Court.

Action for damages laid in the sum of $50,000 for injuries sustained by petitioner's intestate, Oscar G. Lang, while assisting in switching cars at Silver Creek, N. Y. The injuries resulted in death. The Safety Appliance Act is invoked as the law of recovery.

There was a verdict for $18,000 upon which judgment was entered. It and the order denying a new trial were affirmed by the Appellate Division, March 5, 1918, by a divided court.

The Court of Appeals reversed the judgments and directed the complaint to be dismissed, to review which action this certiorari is directed.

In general description the court said: "In the case before us the defendant [Respondent] was engaged in interstate commerce. A car without a drawbar or coupler was standing on the siding. The plaintiff's intestate was a brakeman and was riding on a second car kicked upon the same siding. A collision occurred and the deceased was crushed between the car upon which he was riding and the defective car."

There is no dispute about the facts; there is dispute about the conclusions from them. We may quote, therefore, the statement of the trial court, passing upon the motion for new trial, as sufficient in its representation of the case. It is as follows: "The defendant had a loaded car loaded with iron which had been placed on a siding at the station at Silver Creek, New York. On

the same track was also standing another car destined for Farnham, the next station east. At Silver Creek this wayfreight had orders to leave a couple of cars and to take on the car going to Farnham. The car loaded with iron above referred to was defective. The draw bar, the draft timber and the coupling apparatus on the westerly end of this car were gone. This car had been on the siding at Silver Creek several days loaded with iron consigned to a firm at Silver Creek, waiting to be unloaded. Its condition was known to the crew of the wayfreight generally and to the plaintiff's intestate prior to the accident. In fact its crippled conditon was the subject of conversations between him and the train conductor only shortly before the accident happened. In getting out the car for Farnham the engine went onto the siding from the westerly end, pulled out a string of six cars including the Farnham car, then shunted the Farnham car onto an adjoining track, placed two of the other cars they had hauled out onto a third track, and then kicked the other three cars back onto the track where the crippled car stood. Plaintiff's intestate was on one of these three cars for the purpose of setting the brakes and so placing them on this siding so as not to come into contact with the crippled car. He evidently was at the brake on the easterly end of the easterly one of the three cars moving toward the crippled car. His foot was resting on the small platform at the end of the car just below the brake wheel. For some reason he did not stop the three cars moving on this track before the cars came into contact with the crippled car. The cars collided, and owing to the absence of coupler attachment and bumpers on the crippled car intestate's leg was caught between the ends of the two cars and he was so injured that he died from the injuries so received. It evidently was not the intention of any of the crew to disturb, couple onto, or move the crippled car."

The statement that "owing to the absence of the coupler attachment and bumpers on the crippled car intestate's leg was caught between the ends of the two cars" is disputed as a consequence or as element of decision independently of what Lang was to do and did—indeed it is the dispute in the case. Based on it, however, and the facts recited the contention of petitioner is that they demonstrate a violation of the Safety Appliance Act and justify the judgment of the trial court and its affirmance by the Appellate

Division. For this *Louisville & Nashville R. R. Co.* v. *Layton*, 243 U. S. 617 is cited.

The opposing contention of respondent is that "The proximate cause of the accident was the failure of the deceased to stop the cars before they came in collision with the defective car. The absence of the coupler and draw bar was not the proximate cause of the injury, nor was it a concurring cause." To support the contention *St. Louis & S. F. R. R. Co.* v. *Conarty*, 238 U. S. 243 is adduced.

The Court of Appeals considered the *Conarty* case controlling. This petitioner contests, and opposes to it the *Layton* case *supra*, and contends that the Court failed to give significance and effect to the fact that the car in the *Conarty* case was out of use and that while out of use the car upon which Conarty was riding collided with it; whereas in the case at bar, it is insisted, that the defective car was in use by defendant and was required to be used by the intestate. The trial court made this distinction and expressed the view that the defective car in the case at bar "must be deemed to have been in use within the meaning of the statute." The distinction as we shall presently see is not justified. It is insisted upon, however, and to what is considered its determination is added a citation from the *Layton* case declaring that the Safety Appliance Act makes "it unlawful for any carrier engaged in interstate commerce to use on its railroad any car not" equipped as there provided. And further, "By this legislation the qualified duty of the common carrier is expanded into an absolute duty in respect to car couplers" and by an omission of the duty the carrier incurs "a liability to make compensation to any employee who" is "injured by it." But necessarily there must be a causal relation between the fact of delinquency and the fact of injury and so the case declares. Its concluding words are, expressing the condition of liability, "that carriers are liable to employees in damages whenever the failure to obey these Safety Appliance laws is the proximate cause of injury to them when engaged in the discharge of duty." The plaintiff recovered because the case came, it was said, within that interpretation of the statute.

We need not comment further upon the case nor consider the cases which it cites. There is no doubt of the duty of a carrier

under the statute and its imperative requirement or of the consequences of its omission. But the inquiry necessarily occurs, to what situation and when, and to what employees do they apply?

The Court of Appeals was of the view that it was the declaration of the *Conarty* case that § 2* of the Safety Appliance Act "was intended to provide against the risk of coupling and uncoupling and to obviate the necessity of men going between the ends of cars. It was not to provide a place of safety between colliding cars" and that "the absence of coupler and draw bar was not a breach of duty toward a servant in that situation." It further decided that Lang was in "that situation" and he "was not one of the persons for whose benefit the Safety Appliance Act was passed."

Two questions are hence presented for solution. (1) Was the Court of Appeals' estimate of the *Conarty* case correct? (2) Was it properly applied to Lang's situation?

(1) The Court's conclusion that the requirement of the Safety Appliance Act "was intended to provide against the risk of coupling cars", is the explicit declaration of the *Conarty* case. There, after considering the Act and the cases in exposition of it, we said, nothing in its provisions "gives any warrant for saying that they are intended to provide a place of safety between colliding cars. On the contrary, they affirmatively show that a principal purpose in their enactment was to obviate 'the necessity for men going between the ends of the cars. 27 Stat. 531.' "

The case was concerned with a collision between a switch engine and a defective freight car resulting in injuries from which death ensued. The freight car was about to be placed on (we quote from the opinion) "an isolated track for repairs and was left near the switch leading to that track while other cars were being moved out of the way—a task taking about five minutes. At that time a switch engine with which the deceased was working came along the track on which the car was standing and the collision ensued." The deceased was on the switch engine and it was on its way

*§ 2 of the Safety Appliance Act is as follows: "On and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any such common carrier [one engaged in interstate commerce] to haul or permit to be hauled or used in its line, any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars." 27 Stat. 531.

"to do some switching at a point some distance beyond the car and was not intended and did not attempt to couple it to the engine or to handle it in any way. Its movement was in the hands of others."

(2) That case, therefore, declares the same principle of decision as the Court of Appeals declared in this, and, while there is some difference in the facts, the difference does not exclude the principle. In neither case was the movement of the colliding car directed to a movement of the defective car. In that case the movement of the colliding car was at night, and it may be inferred that there was no knowledge of the situation of the defective car. In this case the movement of the colliding car was in the day time and the situation of the defective car was not only known and visible, but its defect was known by Lang. He, therefore, knew that his attention and efforts were to be directed to prevent contact with it. He had no other concern with it than to avoid it. "It was not", the trial court said, "the intention of any of the crew [of the colliding car] to disturb, couple onto, or move the crippled car." It was the duty of the crew, we repeat, and immediately the duty of Lang, to stop the colliding car and to set the brakes upon it "so as not to come into contact with the crippled car", to quote again from the trial court. That duty he failed to perform, and, if it may be said, that notwithstanding he would not have been injured if the car collided with had been equipped with draw bar and coupler, we answer, as the Court of Appeals answered, "still the collision was not the proximate result of the defect." Or, in other words, and as expressed in effect in the *Conarty* case, that the collision under the evidence cannot be attributable to a violation of the provisions of the law "but only had they been complied with, it [the collision] would not have resulted in the injury to the deceased."

Judgment affirmed.

A true copy.

Test:

Clerk Supreme Court, U. S.